

Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil

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I. INTRODUCTION

All of us negotiate every day, but lawyers negotiate more than most people. Negotiation pervades the life of a lawyer. Lawyers negotiate on behalf of their clients in dealmaking and dispute resolving situations.¹ They negotiate on a professional level with other lawyers, clients, employees, and law firm vendors. Lawyers also negotiate with friends, family, and others in their personal lives. Without a doubt, better negotiation and conflict resolution skills make for a better law practice and a better life. Negotiation is not just a lawyering skill. Negotiation is a life skill.

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1. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 2-5 (1983).

In 1981, Roger Fisher and William Ury, in their now classic book *Getting To Yes: Negotiating Agreement Without Giving In*, wrote that "conflict is a growth industry."² Today, the teaching of negotiation and conflict resolution is a growth industry as well. In the fifteen years since *Getting To Yes* was published, virtually every law school has developed one or more elective courses in negotiation³ and alternative dispute resolution (ADR).⁴ Some law schools have placed negotiation and ADR on a menu of required courses, and other schools have integrated these topics into the first-year curriculum.⁵ Negotiation and ADR skills are two of the fundamental lawyering skills in the MacCrate Report.⁶ However, education about negotiation⁷ and ADR is not just for lawyers. These subjects have become pervasive in our educational system. In fact most colleges and universities offer such courses;⁸ and mediation⁹ is even taught in elementary schools.¹⁰

2. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* xvii (1981).

3. John D. Feerick, *ADR in Law Schools: The New Curricula*, 51 DISP. RESOL. J., April-Sept. 1996, at 60; Roger Fisher & William Jackson, *Teaching the Skills of Settlement*, 46 SMU L. REV. 1985 (1993); Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995 (1993).

4. Alternative Dispute Resolution, or ADR, is a group of processes used to resolve conflicts. Negotiation, mediation, and arbitration are the principle processes of ADR. In addition, a variety of other processes, such as summary jury trials, mini-trials, early neutral evaluation, and court-annexed non-binding arbitration have captured significant attention in the area of ADR. ADR courses in law schools focus primarily on negotiation and mediation.

5. See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987)(discussing exercises for use in a first-year law course).

6. SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* (1992)[hereinafter *MACCRATE REPORT*]. This publication, better known as the MacCrate Report, presents a list of fundamental lawyering skills and values that the legal profession should develop in lawyers.

It has been argued that the MacCrate Report has not gone far enough in recognizing the importance and complexity of negotiation and ADR. See Carrie Menkel-Meadow, *Narrowing The Gap By Narrowing The Field: What's Missing From The MacCrate Report - of Skills, Legal Science And Being A Human Being* 69 WASH. L. REV. 593 (1994).

7. *MACCRATE REPORT*, *supra* note 6, at 125.

8. Cindy Fazzi, *Today's School Days: Readin' Writin' & ADR*, 49 DISP. RESOL. J. 73 (1994).

9. John Barkai, *Applying the Hawaiian Mediation Model to Disputes and Conflicts*, 11 INTERSPECTIVES 40 (1992)(stating "mediation is a conflict resolution method in which a mediator helps two people negotiate a voluntary solution to their dispute").

10. RICHARD COHEN, *STUDENTS RESOLVING CONFLICT: PEER MEDIATION IN SCHOOLS* (1995); NORTHWEST MEDIATION SERVICE, *EVERYDAY CONFLICTS, CREATIVE SOLUTIONS: A CONFLICT MANAGER TRAINING PROGRAM FOR ELEMENTARY SCHOOL STUDENTS* (1991).

This Article will discuss some unique approaches that I use as part of an experiential learning approach to teaching negotiation and ADR skills.¹¹ The Article emphasizes communication skills. Although the key concepts of effective negotiation and ADR skills are contained in the ideas of "underlying interests of the parties" and "effective communication between the parties," I hope that these concepts will be more enticing to readers if I say instead that the idea is for "the Savvy Samurai to meet the Devil."

II. THE ANGELS & DEVILS: THE LIMITING PERSPECTIVE

Imagine the following cartoon.

At a long table in the clouds, three angels with long hair, beards, white wings, and halos are at the far left end of a table facing three devils who are at the far right end of the table. The head angel is seated, holding a document in one hand and pointing a finger from his other hand in the direction of the devils. The two other angels stand behind this angel, as if offering support. The three devils have black wings, horns, and pitchforks. The head devil sits at the table with a document in his hand and the other two devils stand behind him as if offering support.¹²

This cartoon, which looks like a negotiation between angels and devils, represents a view of negotiation as a conflict between good and evil. Although it is possible to envision ourselves at either end of this negotiating table, most of us see ourselves on the side with the angels. In most negotiations, people assume that their perspective on the conflicting issues is the correct, reasonable, rational, and justified position. The other side appears to be incorrect, unreasonable, irrational, and unjustified in their demands.

Negotiators often have a difficult time recognizing that their opponent's view may also be legitimate and reasonable. In this sense, they see themselves on the side of the angels negotiating with opponents who are devils. This perceptual view is one of the principal reasons why negotiation and conflict resolution is so difficult. Effective negotiation often requires a major shift in perspective that allows negotiators to see merit on both sides.

In class, I use optical illusions to demonstrate the idea of differing perspectives in a conflict. Many specially constructed optical illusions appear to be a single image, but actually contain two very different images. The classic old woman/young woman reversible image is a

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11. The major ADR course that I teach is a two-credit course entitled "Negotiation and ADR" which is an ADR survey course at the University of Hawaii School of Law.
 12. Cartoon drawing by Dana Fradon, *NEW YORKER MAGAZINE*, April 20, 1987, at 39, reprinted in JOHN S. MURRAY ET AL., *PROCESS OF DISPUTE RESOLUTION* 387 (1988). I use the cartoon without the caption. However, the caption reads, "Then it's agreed. Watson, Smith, Teller, and Wilson go to Heaven; Jones, Paducci, and Horner go to Hell; and Fenton and Miller go to arbitration." *Id.*

common optical illusion already known to many people. This image was first drawn in 1915 by W.E. Hill and is found in many books about optical illusions.¹³ The image can appear to be either a young woman or an old woman depending on your perspective. Viewers initially see either the young or the old woman, but not both women. Once the illusion is explained most people can see both women, but only one at a time. This illusion demonstrates how the same facts (black lines and markings on a white page) can be seen from two different perspectives. The obvious analogy is that two opposing negotiators may see the same situation from very different and conflicting perspectives.¹⁴

The young woman/old woman illusion is one of many such images that can be used to make the point on differing perspectives.¹⁵ Some figures require a literal shift in perspective—a rotation of the image 90 to 180 degrees to see the other view.¹⁶ I have found such illustrations to be extremely effective when working with non-native speakers of English or when teaching through a translator to people who do not speak English. A picture is worth a thousand words on the perspective point with these groups, and American law students as well.

Seeing the other negotiator as the devil is a perspective that places significant limitations on successful, efficient negotiation and conflict resolution. This angels versus the devils perspective needs to be challenged and replaced by a more positive image for conflict resolution.

III. NEW MODELS OF NEGOTIATIONS AND THE ORANGE CONFLICT

In the past two decades, a wide variety of academic and popular writings have described and explained the negotiation process.¹⁷

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13. In this reversible image called, "My wife and my mother-in-law," the young lady's chin and ear become old lady's nose and eye. LARRY KETTELKAMP, *TRICKS OF EYE AND MIND* 50 (1974); SEYMOUR SIMON, *OPTICAL ILLUSION BOOK* 37 (1976).
 14. MURREY ET AL., *supra* note 12 (stating the proposition that participants in a specific dispute will have varying perceptions of the single factual situation comprising the dispute). For more about perception in negotiation see FISHER & URY, *supra* note 2, at 22-27.
 15. For other books about optical illusions see NELSON F. BEELER & FRANKLYN M. BRANLEY, *EXPERIMENTS IN OPTICAL ILLUSION* (1951); CHARLES H. PARAQUIN, *THE WORLD'S BEST OPTICAL ILLUSIONS* (1987); LAURENCE B. WHITE, JR. & RAY BROEKEL, *OPTICAL ILLUSIONS* (1986). Optical illusions can also be downloaded from the World Wide Web.
 16. In another common illusion, the straight-on view looks like a clown, but when the drawing is rotated 90 degrees it allows a whole circus to become visible. KETTELKAMP, *supra* note 13, at 108.
 17. Some of the more popular books that have been used in law school teaching (in order of publication) are: HARRY T. EDWARDS & JAMES J. WHITE, *THE LAWYER AS A NEGOTIATOR* (1977); GARY BELLOW & BEA MOULTON, *LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978)(a chapter on negotiation); FISHER & URY, *supra* note 2; HOWARD RAIFFA, *THE ART AND SCIENCE OF*

Some of the most influential writing has expanded traditional conceptualizations of the negotiation process by arguing for alternatives to the competitive, power-based negotiation process.¹⁸ These later writings often argue for what is now popularly called a "win-win" approach to negotiation.¹⁹ Whatever it is called, the two key concepts of these alternative approaches to negotiation and conflict resolution are: (1) underlying interests of the parties and (2) effective communication between the parties.

The favorite example used by negotiation teachers to discuss the concept of underlying interests is the classic story about two sisters arguing over an orange.²⁰ Both sisters want the orange for undisclosed reasons. Their conflict appears to be a distributional negotiation problem, meaning that the resources that they are negotiating about (the orange) are fixed and limited (there is only one orange).²¹ If one sister gets the orange, the other sister gets nothing. As long as the sisters argue over positional solutions (who gets the orange), one

NEGOTIATION (1982); GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983); ROGER HAYDOCK, *NEGOTIATION PRACTICE* (1984); STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* (1985); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987); MURRAY ET AL., *supra* note 12; DONALD GIFFORD, *LEGAL NEGOTIATION* (1989); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990); WILLIAM URY, *GETTING PAST NO* (1991); CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (2nd ed. 1993).

18. FISHER & URY, *supra* note 2; THOMAS F. GUERNSEY, *A PRACTICAL GUIDE TO NEGOTIATION* (1996); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COOPERATIVE GAIN* (1986); URY, *supra* note 17; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795 (1984).
19. Fisher and Ury refer to this approach to negotiations as "principled negotiations," FISHER & URY, *supra* note 2, at 11. Carrie Menkel-Meadow refers to it as the problem solving approach. The popular literature simply calls it win-win. For examples of win-win books see L. BEALE & R. FIELDS, *WIN-WIN WAY: THE ULTIMATE STRATEGY FOR PERSONAL & PROFESSIONAL SUCCESS* (1987); L. BEALE & R. FIELDS, *WIN-WIN WAY: THE NEW APPROACH TRANSFORMING AMERICAN BUSINESS & LIFE* (1987); ARNOLD GERSTEIN & JAMES REAGAN, *WIN-WIN APPROACHES TO CONFLICT AVOIDANCE* (1986); FRED E. JANDT, *WIN-WIN NEGOTIATION: TURNING CONFLICT INTO AGREEMENT* (1987); ROSS RECK & BRIAN G. LONG, *WIN-WIN NEGOTIATOR* (1989); PETER B. STARK, *IT'S NEGOTIABLE: THE HOW-TO HANDBOOK OF WIN/WIN TACTICS* 61 (1994); C. WHITNEY, *WIN-WIN NEGOTIATION FOR COUPLES* (1986). This style of negotiation is also called "value-added negotiation." See KARL ALBRECHT & STEVE ALBRECHT, *ADDED VALUE NEGOTIATING* (1993).
20. The story about the sisters' conflict over the orange has been attributed to Mary Parker Follett, see Deborah M. Kolb, *The Love for Three Oranges, Or: What Did We Miss about Ms. Follett in the Library?* 11 NEGOTIATION J. 339, 339 (1995).
21. In a distributional negotiation, the resources are limited. It is a "fixed-pie" situation. RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* 4 (1965). Whatever one party gains, the other party loses. MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 16 (1992). Another term for this is zero-sum negotiation.

seems likely to get what she thinks she needs (a whole orange) and the other seems likely to get nothing. Hence they argue (or we could say they negotiate) over which sister will get the orange. One apparently will win everything; the other apparently will lose everything.

In typical positional negotiation, this conflict might be resolved any number of ways: compromise ("What if we split the orange in half?"), appeals to a higher authority ("Mommy, Daddy, make her give me the orange."), the use of trade-offs ("I'll give you this orange, if you let me have my choice of television programs tonight."), or perhaps the use of power (the older and stronger sister just takes the orange from her younger, weaker sister).²² All traditional solutions leave at least one sister, and maybe both,²³ without the orange.

The concepts of underlying interests and effective communication can bring a new dimension to this negotiation about the orange. If the sisters could engage in "interest-based bargaining" and disclose their interests in the orange, they might be able to find a creative, win-win solution to their conflict. As it turns out, although both sisters have the same position, (they both would say, "I want the orange"), their interests are very different. One sister wants the orange to use the rind for baking. The other sister wants the orange to use the juice for drinking. If their underlying interests were disclosed to each other during the negotiation and they reached a settlement based upon those interests rather than their positions, then both sisters could "win" the negotiation. Both sisters could, in a sense, get what they need—a whole orange—or at least all of the orange that they need. One sister could have the juice from the whole orange for drinking and the other sister could have the rind from the whole orange for baking.

Although there still is only one orange, because of the sisters' differing interests in the orange, they can use the resources of the single orange as if there were two oranges. One sister gets all the juice; the other gets all the rind. In a sense, both sides win, and hence the term "win-win."²⁴ Using interests as the basis for bargaining and finding a creative solution to improve the negotiating situation is sometimes re-

22. Such a power "solution" will probably lead to yet another conflict between the sisters in the near future.

23. If the negotiation between the sisters causes too much noise and disruption, a parent might take the orange away and neither sister will have it.

24. There is also a risk associated with the disclosure of interests. If only one sister discloses her interest in the orange, she may be at a disadvantage if her sister does not likewise disclose her interest.

ferred to as "expanding the pie"²⁵ or "creating value"²⁶ in the negotiation.²⁷

In addition to their different substantive interests in the juice and the rind, the sisters might have had different psychological needs that could influence the orange negotiation. These psychological needs would be similar to the needs that Abraham Maslow described in his hierarchy of needs.²⁸ They might even be unconscious needs. For example, each sister might have wanted to use the negotiation to get some recognition of her importance from the other sister ("If my sister really thinks that I am important, she will let me have the orange."). A sister might also have a need to demonstrate power or dominance ("I can dominate my sister by taking this orange."). These needs are not directly related to the orange itself and could appear in any negotiation between the sisters. For example, the same needs could arise in a negotiation over which television show to watch or who will ride in the front seat of the car. The point is that negotiators can have different substantive interests and psychological needs.²⁹ The boundary between interests and needs is not a bright line and is seldom clearly communicated in the negotiation literature.³⁰

Negotiation teachers often use the orange example to discuss effective communication for conflict resolution, and the sisters' story works well on this point, too. One of the reasons why the sisters cannot reach an integrative,³¹ win-win solution in which each sister gets the part of the orange she wants is because of ineffective communication. Perhaps they never told each other exactly why they wanted the orange and what they were going to do with it. Maybe they never asked each other "Why do you want the orange?" Or perhaps they did ask each other, but at least one of the sisters, in an attempt to protect her information, purposely did not answer the question, diverted the other sister away from the topic, or simply lied. An emphasis on good com-

25. BAZERMAN & NEALE, *supra* note 21, at 16 (discussing what they call the "mythical fixed-pie").

26. See LAX & SEBENIUS, *supra* note 18, at 88-153.

27. Winning implies victory over another party, so perhaps a more accurate description is that the negotiated solution is a "better-better" solution for each party.

28. ABRAHAM H. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (1962).

29. Christopher Moore, an author and mediator, refers to three types of interests, 1) substantive, 2) procedural, and 3) psychological. CHRISTOPHER W. MOORE, *MEDIATION PROCESS* 37 (1986).

30. "The most powerful human interests are basic human needs." FISHER & URY, *supra* note 2, at 49. "Opposed interest means that the parties' differing needs lead them to incompatible preferences among the alternatives under consideration." DEAN PRUITT, *NEGOTIATION BEHAVIOR* 1 (1981). "Needs. Use this term lightly—it could mean wants, values, interests or the things you care about." H. CORNELIUS & S. FAIRE, *EVERYONE CAN WIN* 120 (1989).

31. WALTON & MCKERSE, *supra* note 21, at 126-43 (discussing the integrative bargaining model).

munication skills during negotiations can assist the parties to learn about the needs of the other party and to avoid disruptive, emotional communication that can be a roadblock to a successful negotiation.

IV. THE UGLI ORANGE NEGOTIATION

A. The Student Simulation

Rather than simply tell students the story about the two sisters arguing over an orange or having them read about it in their negotiation text,³² a negotiation simulation based on this story appears to be the single most effective simulation for teaching negotiation and ADR. The Ugli Orange negotiation simulation is the perfect starting point³³ for a class in negotiation and ADR because it is simple and it can be used to introduce the two major negotiation and ADR themes of underlying interests and effective communication.

In the Ugli Orange negotiation,³⁴ Dr. Jones and Dr. Roland, two biological research scientists representing rival pharmaceutical companies, seek to acquire the entire crop of Ugli Oranges that was grown in the world this year. Dr. Jones is interested in the Ugli Oranges because of a recent outbreak of Rudosen, a disease contracted by pregnant women that causes serious brain, eye, and ear damage to unborn children unless the pregnant mothers are inoculated early in their pregnancy. Juice from the Ugli Orange can be made into a synthetic chemical serum by Dr. Jones' company to prevent the spread of Rudosen.

32. Of course, the Ugli Orange simulation must be done before assigning a negotiation book reading that discusses the sisters' conflict over the orange. In *Getting to Yes*, the orange story is in one of the early chapters. FISHER & URY, *supra* note 2, at 58.

33. The Ugli Orange simulation can serve as a reference experience during the remainder of the course. I often refer back to this simulation during later class discussions. In addition, I have even used a question about this simulation on my final examination. The question was:

The Ugli Orange negotiation simulation in class seemed to have a perfectly integrative, "win-win" solution to the negotiating problem. One side wanted the juice; the other side wanted the rinds. The question for you to answer is:

Is it possible to have such a perfectly integrative, "win-win" solution in the "real" world?

If you believe that the answer is "yes," can you provide an example?

If you believe the answer is "no," how close can you get to a perfectly integrative solution?

34. The Ugli Orange simulation is reproduced in Appendix A. The origin of the Ugli Orange simulation is unknown to me. Students do this negotiation in pairs. They must situate themselves such that they cannot hear what another pair is saying during their negotiation. The arrangement requires at least two rooms and perhaps the hallway.

Dr. Roland is interested in the Ugli Oranges because of a recent leak of nerve gas from old chemical warfare bombs stored in bomb chambers on a small Pacific island. Thousands of people will die or incur serious brain damage if the gas gets out of the bomb chambers and spreads to the coast. Rinds from the Ugli Orange can be made into a synthetic chemical gas by Dr. Roland's company to neutralize the nerve gas.

Mr. Cardoza, a farmer in South America, owns most or all of the Ugli Oranges grown in the world this year.³⁵ The students, playing the roles of Jones and Roland, are told to speak with each other before going to South America to try to purchase the Ugli Oranges from Cardoza.

Initially, some students do not even understand why they should talk with each other. They see only one possible negotiation here—the talk between Cardoza and either Jones or Roland. These students must be told that they should treat the meeting between Jones and Roland as a negotiation. They need to understand the principle that everything is negotiable.³⁶ Once the students realize that their discussion is in fact a negotiation, the negotiation can play out in many different ways, which is one of the benefits of using simulations.

The first perspective for most students doing the Ugli Orange negotiation is like the angels and devils cartoon, with both negotiators perceiving themselves as aligned with the angels. Often, the students do not even consider who is on the other side of the negotiating table or what the other side's interest might be. Because both Jones and Roland see themselves as great humanitarians without a profit motive, they initially expect that the other negotiator will let them have all the Ugli Oranges once the other negotiator learns about their non-profit, humanitarian motive—to prevent birth defects from Rudosen disease or to prevent death or brain injury from the nerve gas. They are blinded by righteousness and assured that they deserve all the oranges. Both Jones and Roland are usually eager to tell each other how important it is for them to acquire the oranges. However, this initial persuasion strategy invariably fails. Both sides talk in an attempt to persuade the other, but neither side can persuade the other side to forego their interest in the oranges.

At this point, the negotiation starts to look like a classic distributional negotiation. Whatever one negotiator wins, the other negotiator loses. Each orange for one looks like one less orange for the other.

35. In the version of the Ugli Orange simulation I use, the two doctors have differing estimates of the total number of Ugli Oranges in the world this year. One side thinks there are 3,000 oranges; the other side thinks there are 4,000 oranges. In many real negotiations, the opposing parties have different data and perceptions of the facts and issues.

36. STARK, *supra* note 19, at 61.

Next, the negotiators often try to bargain over who has the greatest immediate need for the oranges. Of course, both Jones and Roland assume that they have the greatest need for the oranges this year. "I will let you have all the oranges next year if you give me all the oranges this year" is a common proposal. However, they both need all of the oranges this year. If one negotiator's company gets all of the oranges, then the other negotiator's company will not get any, and the humanitarian objectives of that negotiator will be thwarted. If Dr. Jones got all 3,000 Ugli Oranges, then Dr. Roland's company cannot prevent the deaths or brain damage from the nerve gas. If Dr. Roland got all 3,000 Ugli Oranges, Dr. Jones' company will not be able to prevent the birth defects from Rudosen. Frequently, the negotiators reach impasse at this point and fail to arrive at any negotiated solution.

The Ugli Orange simulation probably has the greatest impact on the negotiators who never discover that they each have different uses for the orange. Although from one perspective these students have failed in this negotiation, these students may gain the most from the simulation because they are not likely to forget the importance of focusing on interests and effective communication.

Stopping the Ugli Orange simulation when approximately one-half of the negotiation pairs have completed their negotiations is highly instructive.³⁷ Half the class is at impasse and half has a solution, so there is a rich mixture of experiential material for the debriefing.³⁸ With about half of the teams not reaching a solution, the remaining negotiated solutions fall into several different categories. A few groups reach a compromise solution in which they divide the number of oranges so that both Jones and Roland get some of the oranges. Usually, each negotiator gets one-half of the oranges (1,500 each).

In rare cases, one negotiator actually agrees that the other negotiator's interests are paramount, and they divide the oranges two-thirds to one-third. When students are given only a few minutes to read their confidential facts and complete the negotiation, they often reach such compromise solutions. Other issues that Jones and Roland discuss include: how they will approach Cardoza, how much money each company will contribute to the acquisition of the oranges, how they will exchange the oranges, and a few groups have even discussed leaving their present company to form a new joint venture just to handle this orange problem.

37. I circulate among the negotiating pairs to listen to their negotiations. After hearing a few sentences, I can usually tell what stage of the negotiation each pair is in.

38. I tell the group when they start negotiating that I will stop them when only half of them have completed the negotiation.

The secret to success in this simulation is the discovery that each negotiator needs only a part of each orange, rather than the whole orange. Dr. Jones needs only the juice of 3,000 oranges; Dr. Roland only needs the rinds of 3,000 oranges. (The J in Jones stands for Juice and the R in Roland stands for Rind.) Negotiators who discover the juice/rinds distinction are usually very pleased with themselves. They work out a negotiated solution to save all the people from both the Rudosen and the nerve gas. They are able to expand the fixed pie.³⁹ They take 3,000 oranges and make them into what looks like 6,000 oranges. They have the juice from 3,000 oranges and the rinds from 3,000 oranges.

My debriefing of this simulation focuses on the key concepts of positions versus interests and effective communication for conflict resolution. The interests are usually obvious—to prevent birth defects or prevent death and brain damage. The position of both Jones and Roland is that they each want all 3,000 oranges. Their interests can explain why they want the oranges—to get the juice of 3,000 oranges or to get 3,000 rinds.

The communication elements of this simulation are also very important. Some negotiating pairs learn of the juice/rind distinction through good questioning.⁴⁰ Some students have asked their negotiating partner why they need the oranges. Most do not. Most students argue strongly for their own positions without disclosing their interests. Often students who do discover the juice/rind distinction find it through luck or accidental disclosure made without thinking about the possible consequences of disclosure. One of the negotiators often simply says "Well, I need the juice to . . ." or "I need the rind to . . ." When this disclosure is made the other negotiator usually quickly says something like, "Great, I need another part of the oranges. You need the juice, but I only need the rind. This is perfect!"

After discovering the juice/rind distinction, many negotiating pairs discuss who will approach Cardoza and how much money they will offer him. Most negotiators, however, do not consider how their competing companies will exchange the unused portions of the oranges. This exchange issue is important considering the companies' prior poor relationship. The more thoughtful negotiators might decide to hire a third-party to separate the juice and the rinds for both companies. Sometimes, each company decides to take 1,500 oranges, remove

39. BAZERMAN & NEALE, *supra* note 21, at 16.

40. Because negotiation and conflict resolution classes and seminars have become so popular, I sometimes encounter students who have already performed the Ugli Orange simulation. In such instances, I ask these students to be my assistants for the simulation. I instruct them to wander among the negotiating pairs and to listen to how some pairs discover or fail to discover the juice/rind distinction. These assistants give a report during the debriefing.

the part of the orange they need first, and then exchange the remaining parts of the 1,500 oranges in their possession with the other side. Using such a procedure attempts to minimize the risk that the other side will fail to produce the remaining oranges. During debriefing, I also use these different solutions to highlight the importance of being alert for new issues that emerge during the negotiation and the importance of comprehensive settlement.

I try to provide positive feedback for all negotiators and encourage them to try alternative negotiation styles. For those who did not reach a negotiated solution I say, "Of course, you would not reach a negotiated solution to such a complex problem in only 15 minutes in the real world, but what could you have done to make more progress here?" For those who feel extremely proud about finding the juice and the rind distinction, I say, "Did you disclose too much information too soon in this negotiation?" For those who divided the oranges 1,500 for one and 1,500 for the other and did not discover the juice-rind distinction, I say "Perhaps you withheld too much information. Would your negotiation have benefited from more disclosure?"

B. Competitive Bargaining with Cardoza

Although the Ugli Orange simulation looks like a perfect vehicle for teaching cooperative, problem-solving negotiation with an integrative, win-win solution, it can be extended to elements of traditional, competitive negotiation tactics and strategy. I usually pose the following hypothetical to the students after the debriefing of their Ugli Orange negotiation.

Assume that Jones and Roland agree to form a joint venture to acquire the oranges from Cardoza. Further assume that Jones and Roland go to talk to Cardoza. How should they proceed? Should Jones and Roland make the first offer to Cardoza or should they allow Cardoza to make the first offer? Why? If they want to make the first offer, what should that offer be? After allowing the students to discuss these topics in small groups, we have a class discussion about first offers, responding to offers, bargaining ranges, goals, concession strategies, commitments,⁴¹ anchoring, and other distributional topics.

C. The Ugli Orange Video

The Ugli Orange simulation works well and is especially meaningful for the students who do not discover the juice/rind distinction. Students who quickly discover the juice/rind distinction, however, may think the simulation is simplistic and not very challenging. Furthermore, they may leave class believing that such a win-win solution is

41. See WALTON & MCKERSIE, *supra* note 21, at 81-121 (discussing commitment tactics).

interesting for class discussion, but that the concept has little applicability to real-world negotiations.⁴² Usually the students who quickly discover the juice/rind solution did not follow through to negotiate the more complex aspects of this negotiation. They did not work out in detail how they would structure their joint venture to buy the oranges, how they would approach Cardoza, or how they would separate the juice from the rinds and still ensure that the opposing company would actually turn over the remaining portions of the oranges to them.

To add greater complexity and interest to the Ugli Orange simulation and to increase the learning about the key concepts, I use a videotape of two other people playing the roles of Jones and Roland in the Ugli Orange negotiation. I play the role of Dr. Jones, and my friend and colleague David Chandler⁴³ plays the role of Dr. Roland. This videotape provides a demonstration to use as a basis of discussion as well as some unusual twists that the students have not explored in their simulated negotiations.

Initially, the videotape looks similar to the negotiation conducted by students in class. Both negotiators argue strenuously for their own positions. But when the negotiators do not get what they want from each other (all the oranges), the level of hostility rises and they begin to make indirect threats. They begin to reject the opposing party's interests and suggest that those interests are neither legitimate nor reasonable.

The second and even more fundamental difference between the videotape and the typical student negotiation of this problem is that once Jones discovers that Roland only needs the rinds, Jones does not immediately disclose that he only needs the juice. Jones presses forward and tries to secure a financial advantage over Roland. The point

42. It is often useful to discuss some of the more famous win-win political negotiation solutions. For example, at the time of the founding of the United States, the large states wanted political representation by population (large states would get more representatives in Congress). Small states wanted representation by political subdivision (small states and large states would each get the same number of representatives in Congress). The solution was to move away from the unicameral Parliament model of England and create a two-house Congress in which state representation in the House of Representatives would be proportional to the total population of each state, but representation in the Senate would be equal for each state. That was a win-win solution. Fisher & Ury also tell of the win-win solution to the Egypt-Israel conflict over the Sinai Peninsula. FISHER & URY, *supra* note 2, at 58.

43. David Chandler is a professor of sociology at the University of Hawaii and we have taught the Negotiations and ADR course at the law school since 1985. In 1979, David and I were members of the first training class for mediators at the Neighborhood Justice Center of Honolulu. We both serve on the Board of Directors. We were founding members (1985) of the University of Hawaii's Program on Conflict Resolution (PCR) and serve on its Policy Committee. We have also conducted three week-long mediation workshops in the Federated States of Micronesia together.

of the tape is not to suggest that non-disclosure is the best way to proceed in negotiation, but rather to alert students to the fact that not every opponent will be using a cooperative, win-win style of negotiation.⁴⁴ Students should not naively assume that the other side will always use cooperative negotiation styles or even tell the truth.

D. Ugli Orange Transcript

I begin the debriefing of the Ugli Orange simulation by asking which negotiating pairs have not yet reached a solution. I then open a short discussion with these groups about what made the negotiation so difficult. After this discussion, I turn to the videotape. But before I start the videotape, I advise the students that the first question I will ask them after only a minute of viewing the videotape is which of the two negotiators holds greater power over the other. A transcript of the videotape is presented below.

R= Roland (David Chandler) needs the rinds

J= Jones (John Barkai) needs the juice

R 1 We've been asked—by the federal government—to assist in a matter of great importance in the Pacific. It's a matter that requires the acquisition of some oranges that are currently being held in South America. I've been led to believe you are interested in these oranges as well.

J 2 [interrupting] Well, my information from my company, tells me that your company is interested in those oranges, and we have a very important interest in those oranges ourselves. I'm sure that if we have a discussion about it, you will understand that my interest is going to be paramount. We just need to acquire these oranges.

I pause the tape at this early point and ask students who has more power in the negotiation. Students have varying opinions on this issue of power. Those who say Dr. Roland has greater power cite a variety of reasons, such as Roland started the negotiations, Roland said he was working with the government,⁴⁵ or that Roland seemed to have a more relaxed style. Those who say Dr. Jones has more power cite other reasons, such as Jones is dominating by interrupting, Jones is speaking faster and louder, or Jones is sitting more erect or that Roland started the negotiation.⁴⁶

Power is easy to talk about, but difficult to assess in a negotiation. I make only a couple of comments about power at this point because I want to stress the idea that information is power later in the video-

44. As my friend Peter Adler, with whom I sometimes co-teach says, "Some Rambo negotiators like it if they 'win-win' and you 'lose-lose.'"

45. Many students from Asian countries, particularly from countries with strongly regulating governments such as Singapore, cite the fact that Roland is working with the government as a very important source of Roland's power.

46. That some people perceive commencing the negotiations as an indicator of power while others perceive it as an indication of weakness is itself quite revealing. Is this, too, a matter of perception and belief?

tape. For now, I usually say that power is an elusive concept. There are many different ways of defining power.⁴⁷ Many people think of power as the ability to force an opponent to accept a settlement on less than favorable terms. Other people think that power is a perception, "either you have it or you don't." Still other people would say that power is having alternatives. If you have alternatives, then you have power. Or, if you lack alternatives and must accept the other party's offer, then you do not have power. I usually tell my students that I cannot tell yet who has more power in this negotiation at this time.⁴⁸

For the next few minutes, the negotiators continue to not listen to each other and they make arguments like lawyers arguing to a court, attempting to persuade the judge that their facts are more persuasive than the other party's. We hear a variety of phrases that the class analyzes for hidden meaning and their impact on the negotiation and the negotiators.

- R 3 I think that as a scientist, you might appreciate the fact that this is really not a commercial venture that we are involved in. This is a matter of life and death. There is a number—I can tell you this—there is a number of old warheads that have been stored in the Pacific that are now in some danger of creating a public health hazard of great significance. If we are unable to acquire these oranges in a very short period of time, there are going to be some very serious implications. The federal government has asked us for our assistance. You can confirm this if you wish.
- J 4 That's really not of interest to me. I can appreciate the concern you do have, but the matter that we are dealing with, and our company is working on, is that we need to have these oranges to save—really it's a matter of life and death—to save lives of young children. Really our work is dealing with pregnant mothers who are about to give birth and unless we acquire those oranges, there are going to be thousands of newborn children with brain damage, serious eye, ear, and throat problems.
- R 5 [interrupting] Is there really any way independently of showing that these oranges are essential for this project?
- J 6 Absolutely, it's Rudosen disease. We're dealing with pregnant mothers. It's very well known.
- R 7 [interrupting] And it's only these oranges that can provide . . .
- J 8 [interrupting] Absolutely, we have to have these special oranges from South America. So there's really no question.
- R 9 Well ah . . .

Responses 3-8 show a variety of subtle negotiation tactics. In R 3, Roland starts to play on a common interest—"as a scientist"—and then he makes a disclosure while at the same time implying that he is keeping some information secret—"I can tell you this." Roland also tries to display some power by asking Jones to confirm Roland's relationship with the federal government. Jones, however, starts to

47. See KENNETH BOULDING, *THREE FACES OF POWER* (1989), reprinted in ROY J. LEWICKI ET AL., *NEGOTIATION: READINGS, EXERCISES, AND CASES* 15-33.

48. Usually I do say that I like one of the negotiators more than the other. Later I mention that the negotiator I like on the videotape is me.

quickly get competitive and not listen much to Roland—"That's really not of interest to me." Jones also attempts to sound very confident of his position—"Absolutely"—"It's very well known."

J 10 [interrupting] I guess frankly, we would really appreciate it if you would kind of bow out of it because we need this crop of oranges. I'd be happy to allow you to have the next crop of oranges

R 11 I was about to suggest that. We're in a matter of great urgency. As you know, children come and go, children live and die, I'm not saying . . . [usually great laughter at this line]

J 12 [interrupting] We need these oranges in the next two weeks. We have to have them. The mothers have to be inoculated. If not, it is going to be too late for these children. If we have to, I'm prepared to go to court and contact my lawyers. You know we have had a history, our companies, unfortunately . . .

R 13 I understand that.

J 14 My people are ready to do what we need to do to keep you out of this.

R 15 Sure, I'm under, I guess, similar instructions. I didn't want to have to bring the attorneys in on this. I thought, perhaps as scientists we could discuss this some more . . . but if necessary we have the attorney general standing by—the attorney general of the United States of America—because of the government's interest in this matter. So we are hopeful that we can find a solution to this, but if necessary we will make every resource available to us to put that at our disposal. But maybe we can talk about this as scientists and find some reasonable way around what appears to be quite a dilemma.

J 16 Well, I don't see our position changing, but . . .

R 17 Ours will not either.

In responses 10-17, both sides dig in their heels and make it clear that they each want this crop of oranges. In J 10, Jones wants Roland to "bow out" and offers Roland the "next crop of oranges." In R 11 Roland does the same—"I was about to suggest that"—and then insults Jones and his interest in saving the children—"As you know, children come and go, children live and die." Both sides also threaten legal action or other power options. Jones implies taking some action to keep Roland from getting the oranges—"My people are ready to do what we need to do." Roland counters this implicit threat—"Sure, I'm under, I guess, similar instructions"—and is willing to go beyond that if necessary—"if necessary we have the attorney general standing by." Finally, Roland makes a signal that he is still willing to talk—"But maybe we can talk about this as scientists and find some reasonable way around what appears to be quite a dilemma." However, both sides reaffirm their positions and indicate they will not change positions in J 16 and R 17—"Well, I don't see our position changing" and "Ours will not either." I usually make the point to the class that if they were rational, truthful negotiators, they would walk away at this point because they have both said they will not change their positions. This exchange illustrates that people often say things they do not mean during a negotiation. It is often helpful to display a poor memory, to forget such statements, and to move towards a solution.

At this point during the videotape, I usually ask the class what solutions they reached in their Ugli Orange negotiation. To prevent the premature disclosure of the juice/rind solution, I first ask who reached a solution in which Jones got some of the oranges and Roland got other oranges. We discuss these situations and why the negotiating pairs divided the oranges the way they did. Typically, almost all groups divide the oranges 1,500 for Jones and 1,500 for Roland.

Finally, I ask about other solutions. Several people usually are eager to tell about their negotiation and how they discovered that one side needed the juice and the other needed the rinds. Jones got 3,000 juices and Roland got 3,000 rinds. When such solutions are mentioned, I can see many eyes look down to their confidential fact sheets, obviously searching their facts for the words "juice" or "rind" that they missed during their earlier preparation. At this point, we discuss the concepts of positions and interests. I then return to the video tape and show the remaining parts.

J 18 Maybe you can tell me what you are going to use the oranges for.

I stop the videotape again at this point and ask the students to comment on the communication patterns displayed so far. We note that until J 18, all communications were usually statements designed to persuade the other side to give up their positions to further the interests of their opponent. J 18 is the first question that has been asked by either side in this negotiation—"What you are going to use the oranges for?" And J 20 contains a follow-up question that elicits more information—"Could you tell me a little bit more—What are you going to do with the oranges?"

R 19 Well, the bomb casing that we are concerned about for the moment, and our best estimates are that the gases are in the process of leaking out at the moment. These gases need to be neutralized and a portion of these rare Ugli Oranges is necessary to make the serum. We have to do this within about four or five weeks in order to solve this problem.

J 20 We also need the oranges to make the serum. Could you tell me a little bit more—I'm kind of technically interested in what you are going to do. What are you going to do with the oranges?

R 21 Well, this is not proprietary at all. As I told you before this is a matter of national urgency. It is not a commercial concern of ours. What we do is we extract from the rinds of the orange, a serum, it is an important component of the serum.

J 22 From the rinds you are getting your serum?

After this comment, I again ask the question that I started the review of the video tape with: which party holds greater power over the other? Unanimously, the class agrees that Jones has the power in this negotiation because he has more information. Information can be power in a negotiation.

R 23 So we need the oranges in order to get the rind from the orange.

J 24 Yeah, I've never heard of that before—that you could work with that.

- R 25 Yeah, no, it's something we have had a breakthrough on. We are able to do that. That's why the federal government asked us to participate in this project.
- J 26 Well, as I said, we too need the oranges.
- R 27 [interrupting] We wouldn't be able to reveal how we do that.
- J 28 Yeah, we have had some patent issues going back and forth. I'm not trying to find that out from you at this point.
- R 29 But that is largely the role of the attorneys and the executives. I was sent because my people largely see this as a scientific problem, and I asked to see you because we feel it is a scientific problem, and as scientists, perhaps, we can make some progress on it that the others wouldn't be able to understand.
- J 30 Well, maybe there is some way that we can share the oranges.
- R 31 Well, that certainly would be desirable. As I understand it there are only 3,000 available . . .
- J 32 That's right
- R 33 . . . and we are going to need all 3,000.
- J 34 We are going to need all 3,000 too. And we really would like to have the complete orange, [hesitating] but there are some things we can do in our proposal that we may not need all the rinds for.
- R 35 How many of—is it possible for us to have all of the rinds you think?
- J 36 I think. . . .
- R 37 We would need—our estimate is that we would need all of the rinds.
- J 38 I don't think we would be able to do what we wanted to if we had to give up all the rinds. But I understand, I believe what you are talking about in terms of life and death issues for your people. So maybe we could allow you to have the rinds if we could have the rest of the oranges. They wouldn't, of course, be as valuable to us. We might have to do something synthetically.

At this point we discuss what is going on in the videotape. Jones is either not fully disclosing his needs or he is lying. Jones is not approaching this as a win-win negotiation. We constructed the video this way to show that not every negotiation is going to be a delightful win-win process. Some negotiators may lie during the negotiation. We discuss what can be done to protect oneself from lying negotiators. Jones' methods do not look very professional to many people. We also discuss the long-range consequences of Jones' behavior and the impact this behavior may have on any joint venture that the two negotiators form.

- R 39 OK. I see. Maybe there is a way of sharing these oranges then. I have a couple of other problems. I need to get the oranges from Cardoza very quickly. We understand—about how much do you think these oranges would be worth if they were, say—if you were just bidding against us? Hopefully we can find some way of not bidding against each other on this.
- J 40 I mean these are not store oranges. They're much more valuable. I would guess that the oranges should go for maybe \$100,000 if he doesn't get wind of the fact that there are competitors there.
- R 41 I think that is about our estimate as well. At least \$100,000. It might take at least a \$100,000 to . . .
- J 42 Your firm is willing to put \$100,000 . . . ?
- R 43 We would be willing to put \$100,000 into this, but I've got to lay my cards on the table. We need to get these orange rinds, and we need to

get them promptly. And we have a contingency which allows us to go over \$100,000 in order to insure that we get that. I would assume that for your purposes that the money wouldn't really be a decisive matter here. So you would be at least willing to do \$100,000 and possibly considerably more than that.

- J 44 OK, I mean we want to lay our cards on the table too. As I said, we need these oranges. Could you tell us how much you think your company could pay, just in case he gets wind of what's going on?

Interestingly, both sides have said they want to "lay [their] cards on the table," but both sides are now holding back the truth. This is another example of negotiators not saying what they mean. Jones is not revealing that he needs only the juice; Roland is not revealing how much money he is authorized to spend. We can discuss if there is any difference in how and why they are withholding information and the ethics of this behavior. From this point forward, I usually play the videotape without interruption or simply stop the videotape at this point.

- R 45 Let's see, we certainly could go over \$100,000, but if we are cooperating on this, we might have an opportunity of going \$200,000 to Cardoza, and equally contributing. Would you be in favor of a proportional contribution, perhaps an equal contribution to the buying of these oranges?
- J 46 Well, as I said, the oranges, if you are taking the rinds aren't going to be as valuable to us. So I'm not sure that I'm willing to match your contribution. Maybe a proportionally lesser contribution. But certainly we will want to pool our money to get all we can of these oranges.
- R 47 Well, are you agreeable to the fact that whatever the proportion we work out that we go in as a joint venture to buy these oranges. That's something that in principle you could see your way towards.
- J 48 I think it's important that we do that and Cardoza doesn't understand that two of us are working together and have different interests, otherwise we will bid up the price of the oranges.
- R 49 If we are the only people bidding on the oranges—then I guess Cardoza—if he wants to sell the oranges, he will have to sell them to us. If, on the other hand, there may be another bidder around we don't know about. Can you give me some idea about how high your side is prepared to go in order to—in order to secure these oranges?
- J 50 Well, ah—we can definitely go to \$100,000.
- R 51 Yeah, we have established that. We say more than that—how much more do you think you'd need in order to . . .
- J 52 Probably, [hesitating] . . . I'm sure we could go to \$150,000.
- R 53 OK, I think we could probably go there as well.
- J 54 Maybe a little more if we need to.
- R 55 Well, why don't we do it this way. \$150,000 each gives us a ceiling of \$300,000. And I think you indicated a moment ago that there might be more than that.
- J 56 If we absolutely needed to do that, I'm sure I could get that authorization, although I can't really go much higher right now.
- R 57 I think that I could guarantee that we could match that. What we do need to—and then perhaps more if it turns out that it is necessary to do so, so we would need to perhaps a little later work on the idea of how we are going to put this deal together as a joint venture. There is another matter, though, about—let's assume for a moment that we are

able to acquire these oranges at a reasonable price and we are sharing it in some agreeable proportion. How do we manage to take the rinds off and make sure that our side gets the rinds in an expeditious way which does not damage the scientific potential of these rinds.

J 58 I'm a little unclear about that because of what we have done before (referring to prior litigation between the companies). I mean we would be glad to take the oranges and simply peel them for you and give you the rinds and work with that.

R 59 I clearly would trust that you would do that in a way that would work, but I'm not sure that the people in my corporation would go along with that.

J 60 I understand—knowing our history. What if we came up with a third group, somebody else, some other company, who would be willing to act as not a monitor, but would do the physical separation.

R 61 Perhaps the university.

J 62 The university, yeah.

R 63 They would be apart from it and they might have the capabilities of doing that. So, would we go to the university together and say "Here is the problem. We are able to get the oranges. We need to have the rinds taken off." My technicians tell me that it is important that the rinds then, subsequently, be stored below 40 degrees and they be into our process plant no later than 48 hours after they're separated.

J 64 How would you feel if we went to the university? I'm having a little bit of feelings that if two of us went to the university, somehow the word might get out to Cardoza that there are two different companies that are using . . .

R 65 I think that might be right. Could you get back from the university kind of a written description of what they would actually do.

J 66 I'm sure I could.

R 67 And I would be assured that would be handled that way. How would we handle any fees charged by the university?

J 68 Seems to me that we should split our fees.

R 69 That would seem reasonable. That is an important thing to keep in mind, budgeting this whole operation. So we need to put together a joint company. I'll get my accountant to contact your financial people and perhaps we can work that one through with them. We need to find a purchasing agent who would contact Cardoza. And we need to contact the university to get this thing handled.

J 70 OK.

R 71 It seems like we might have been able to save some lives here. I appreciate very much your cooperation on this, doctor.

J 72 Been nice working with you.

R 73 Been nice working with you.

J 74 Thank you very much.

V. TALKING LIKE A DUCK: EFFECTIVE COMMUNICATION FOR CONFLICT RESOLUTION

Communication is at the heart of negotiation and mediation,⁴⁹ the two principal ADR skills taught in law schools. Teaching communica-

49. Arbitration is also typically taught in ADR courses. I teach meeting facilitation in my course, although I think this is somewhat unusual. Meeting facilitation is similar to mediation. The ability to facilitate group meetings is useful for lawyers

tion skills in the law school, however, is difficult for a number of reasons. Initially, students want to learn about negotiations, but not about communication. Students often think that successful negotiation depends on tactics and tricks. When I teach negotiation and mediation to lawyers and business executives outside of the law school, there is even less interest in communication skills. The older, more experienced trainees usually do not think they need any instruction in communication, especially if they are already successful professionals. Many such successful people think they are already excellent communicators. It has been said that 85 percent of people think they are among the top ten percent of all communicators. They are wrong.

Even if the trainees are not initially eager students of communication, hopefully the Ugli Orange simulation has had an impact on them. They usually become more receptive to learning better communication skills because many of them have just experienced a failure to successfully resolve the Ugli Orange conflict because of ineffective communication. After being in the Ugli Orange simulation, it seems obvious that to be an effective negotiator they will have to modify their normal communication style.

It is almost impossible to over-emphasize the importance of good listening and communication skills for conflict resolution. The failure to effectively communicate during negotiations can be both dealbreaking⁵⁰ and conflict escalating. I find that both humorous⁵¹ and tragic stories of miscommunication have a great impact on the students.

who often attend meetings as part of their practice or bar and community activities. The classic book about facilitation is MICHAEL DOYLE & DAVID STRAUS, *HOW TO MAKE MEETINGS WORK* (1976). Some excellent recent sources in this area include: RICHARD CHANG & KEVIN KEHOE, *MEETINGS THAT WORK!* (1994); DALE HUNTER & MARION HAYNES, *EFFECTIVE MEETING SKILLS* (1988); DALE HUNTER ET AL., *THE ART OF FACILITATION* (1995); THOMAS KEYSER, *MINING GROUP GOLD* (1990); ROBERT LEVASSEUR, *BREAKTHROUGH BUSINESS MEETINGS* (1994); ROGER MOSVICK & ROBERT NELSON, *WE'VE GOT TO START MEETING LIKE THIS!*; STEVE SAINT & JAMES LAWSON, *RULES FOR REACHING CONSENSUS* (1994); THE 3M MANAGEMENT TEAM, *MASTERING MEETINGS* (1994).

50. The failure to successfully conclude a business deal can be the result of cross-cultural miscommunication. See ROSALIE TUNG, *BUSINESS NEGOTIATIONS WITH THE JAPANESE* 74 (1984)(reporting that communication breakdown due to the cultural difference is most likely to cause the failure of business negotiations between U.S. and Japanese companies).
51. Gerald Clay, mediator, lawyer, and co-author with Fletcher Knebel tells the following story about miscommunication with a divorce lawyer talking with a potential client.

Lawyer: Let me ask you some questions. Do you have any grounds for the divorce?

Client: Yes, of course. I have a house in town and one on the beach too.

Lawyer: No, what I mean is, do the two of you have a grudge?

Client: Well, of course, and a very large one too. We can park three cars in it.

To introduce the topic of miscommunication, I remind the students of the telephone game that many of us played as children. In that game, a story gets passed around the room child-to-child as each in turn whispers the story to the next child (pretending they are telling the story by telephone). By the time the story gets completely around the room, it is usually quite different from when it started. There is the potential for at least a small miscommunication in every whispered repeat of the story. Factual information is rarely spoken, heard, or remembered with complete accuracy.

Although people assume that miscommunication is usually harmless, in fact, miscommunication is often a factor in airline disasters. The deadliest airline accident of all time was the result of miscommunication. A total of 582 people were killed on March 27, 1977, at Santa Cruz de Tenerife, Canary Islands when two jumbo jets collided on the runway. One jet had not yet been cleared for take-off, but its pilot had misunderstood the control tower. The jet was approaching take-off speed when it collided with another jumbo jet that had turned onto the wrong runway because its pilot had misunderstood taxiing instructions. All 249 passengers on a KLM plane and 333 of 394 passengers aboard a Pan Am jet were killed.⁵²

In another tragedy, the "black box" recording from an accident that took the lives of 69 people aboard an Air Florida flight that crashed on take-off from Washington D.C.'s National Airport indicated that the pilot misunderstood the co-pilot's repeated, indirect communication about ice building up on the airplane.⁵³ There are also many tragic wartime accidents in which soldiers died of what is called "friendly fire" when bombs were dropped and artillery fired on an army's own men because the location of the men or the bombing coordinates were misunderstood during the communication.

Although I think communication is a fascinating subject, I realize that it can be a rather dry and boring subject for many people. In fact, I purposely start the communication material with the dull presentation that meets the students' expectations. I begin with a version of a

Lawyer: Let's get more basic. Does your spouse beat you up or anything like that?

Client: No way. I get up at 6 am every morning. My spouse needs two alarm clocks just to get up by 7 am.

Lawyer: OK, then just tell me why you want a divorce.

Client: It's simple. We just cannot communicate.

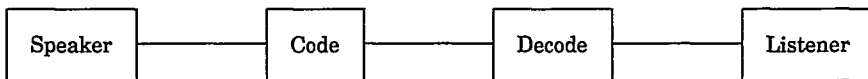
GERALD CLAY & FLETCHER KNEBEL, *BEFORE YOU SUE* (1987).

52. INFORMATION PLEASE ALMANAC 406 (49th ed. 1996).

53. DEBORAH TANNEN, *TALKING FROM 9 TO 5: HOW WOMEN'S AND MEN'S CONVERSATIONAL STYLES AFFECT WHO GETS HEARD, WHO GETS CREDIT AND WHAT GETS DONE AT WORK* 191-94 (1994).

classic communication diagram, which shows the communication flowing from the speaker to the listener.⁵⁴

FIGURE 1



As the communication flows from the speaker to the listener, the message must be coded and then decoded.⁵⁵ The speaker's thoughts are put into a code (words and non-verbal behavior) which the speaker says or acts out. The listeners then decode this message in their minds as they try to interpret the speaker's thoughts and actions. After the listener gets a message, the listener usually becomes a speaker and sends a message back to the first speaker, who then becomes a listener. Then the process repeats—speaker, code, decode, listener. Even just a minute of this code/decode discussion begins to make students drowsy in my class.

A contemporary, real life example of how the coding and decoding process can cause communication problems occurred when pop star Madonna was interviewed by a reporter from a Budapest newspaper called *Blikk*. The reporter asked the questions in Hungarian and the questions were translated into English for Madonna. Madonna's answers were translated back into Hungarian for *Blikk* to print. When the newspaper *USA Today* had the interview retranslated from Hungarian back into English the multiple translations, like coding and decoding, seemed to intensify the communication problems. Below are some examples of the end result of multiple translations. You can guess what some of the original conversation might have been and how it went astray, especially when idioms were being translated.

The interviewer said things like:

Budapest says hello with arms that are spread-eagled. [meaning open-armed?]

Our young people [. . .] who hear your musical productions and like to move their bodies in response. [dancing?]

Madonna, let's cut toward the hunt: Are you a bold hussy-woman that feasts on men who are tops? [meaning "cut to the chase?" and what else I am not sure]

54. A version of this communication diagram can be found in MARK D. BENNETT & MICHELE S.G. HERMANN, *THE ART OF MEDIATION* 74 (1996).

55. I think the "code" "decode" part of this model for communications is especially good for cross-cultural negotiations where the negotiators do not speak the same language. In this situation, the "code" "decode" stages can refer to the translation from one language to another.

Is this how you met Carlos, your love-servant who is reputed? Did you know he was heaven-sent right off the stick? [meaning "right off the bat?"] Or were you dating many other people in your bed at the same time?
Here's a question from left space. [meaning "from left field?"]

Madonna said things like:

[In response to a question about whether her boyfriend Carlos was the father of her child] No, he was the only one I was dating in my bed then, so it is a scientific fact that the baby was made in my womb using him.
I am working like a canine all the way around the clock! [like a dog all day]⁵⁶

Gary Larson, creator of the Farside cartoons, makes the point about the difficulty of being understood in another way. In one Larson cartoon, a man is trying to talk to a duck. There are six images of the man and the duck in the cartoon, representing attempts by the man to communicate with the duck. First, the man tries to speak German. "Sprechen Sie Deutsch?" No response from the duck. Next he tries Spanish. "Habla Español?" No response from the duck. How about French? "Parlez-vous Français?" Again, no response from the duck. Finally the man says "Quack." Low and behold, in the next cartoon image, the duck responds with "Quack." In the final image, the man and the duck are enjoying a conversation of "Quack, quack, quack, quack, quack," from the man, and "Quack, quack, quack, quack, quack," from the duck.

One way to understand the message in this duck cartoon is to say that a negotiator, acting as a professional conflict resolver, must remain flexible and be willing to try different communication approaches until he can get his message understood. Like the man trying various languages until he finds what works with a duck, a negotiator must be flexible enough to send messages in ways that will be understood by the other party, even if that means that the manner of communication feels unnatural to the negotiator. And for many people, learning good communication skills is like learning a foreign language or even learning to talk like a duck.

Good communication is also about listening. However, many lawyers negotiate as if they were appearing in court to argue a case. They work hard at verbal persuasion, but place little emphasis on listening.⁵⁷ When I teach about communication, I use the Chinese character "ting," which means "to listen." Ting is an interesting Chinese

56. Gary Trudeau, *I Am A Tip-Top Starlet*, TIME, May 20, 1996, at 84. As the following exchange indicates, perhaps not all word substitutions were the result of miscommunication.

Blikk: What was your book *Slut* about?

Madonna: It was called *Sex*, my book?

Blikk: Not in Hungary. Here it was called *Slut*.

Id.

57. This pattern is similar to the first 19 exchanges between Roland and Jones in the Ugli Orange negotiation videotape which showed many attempts at persuasion and no listening.

character because it is made up of six other characters which can be read as "ear," "king," "eyes," and "heart," and the numbers "one" and "ten." Looking at the placement of the characters it is as if "ting" could be saying, "When listening, the ear is king. Use ten eyes, and one heart." Even if this is not quite the literal reading of "ting," it makes an interesting point when teaching communication for conflict resolution, especially when teaching in the Asia-Pacific region.

In many Western cultures listening is undervalued. This is especially true among lawyers; most lawyers do not listen enough. Many lawyers were probably told as children, "Some day, you will grow up to be a lawyer." These casual career predictions were not made because these children demonstrated superb analytical reasoning skills. These children probably were seen as future lawyers because they talked a lot. Too much talking and not enough listening is often a problem for lawyers in a negotiation. It is one of the reasons many negotiating pairs do not reach a resolution during the Ugli Orange negotiation. The old saying makes that point best, "You were born with two ears and one mouth, and that is the proportion in which you should use them."

Talking, not listening, is the image America has of lawyers. And listening is not easy, especially in conflict situations. One reason that listening is so difficult is that talkers are so slow (or perhaps listeners are too fast). Most people can listen at about 450 words per minute, but they can only talk about 175 words per minute. Therefore, listeners have a lot of extra time on their hands (and in their minds) when they are listening—time during which they evaluate what the other person just said, prepare their next response, or wander away in their minds to more interesting places.

Emotions frequently affect listening in negotiations. Conflict evokes strong emotions, and people engaged in a conflict are often "D.U.I." D.U.I. commonly refers to the traffic violation of Driving Under the Influence of intoxicating liquor. But in negotiation, people are under the influence of intoxicating emotions. They are disputing under the influence of frustration, anger, fear, anxiety, ignorance, rage, misunderstanding, impatience, lack of self-worth, defensiveness, pettiness, and many other emotions.

In the final analysis, effective communication means talking to be understood. It involves recognizing and overcoming some common communication problems such as distractions, failure to listen, and emotional blocks. Communicating effectively for many people is like learning to speak a foreign language and the image of talking like a duck is a good reminder of some of these problems.⁵⁸ Although the

58. In class, I use a variety of unusual visual aids, such as a fuzzy duck that makes a quacking sound, an inflatable plastic duck, and a duck hunter's call.

duck image is humorous, it may not be quite serious enough for some people. Besides, no one really aspires to talk like a duck. So, I suggest the savvy samurai warrior approach.

VI. THE SAMURAI COMMUNICATOR

If learning communication skills sounds too wimpy for some people, then the image of the samurai warrior may have greater appeal. It certainly makes the communication training more fun and interesting. The samurai is the warrior class of ancient Japan whose ideals and traditions still have an important impact on the Japanese people today.⁵⁹ In olden times, the samurai warrior of Japan was a servant of landowners who hired the samurai to protect their land, property, and themselves. Because the samurai do battle for others, the comparison of samurai and lawyers seems appropriate.

Students seem to like the samurai for a variety of reasons. Some people like the warrior image. Other people, especially when I am teaching in Hawaii⁶⁰ or Pacific-rim countries, appreciate the Asian appeal which might be linked to their cultural roots or to an interest in the martial arts. Other people simply like the entertainment aspect of the samurai. I also find the samurai image to be useful because I have integrated samurai weapons and philosophy into my teaching.

I began to use the savvy communication samurai image after reading *Verbal Judo* by George J. Thompson and Jerry B. Jenkins.⁶¹ Thompson and Jenkins describe the samurai as someone who was trained to enjoy the attack.⁶² For the samurai, the issue was not winning or losing or even living or dying.⁶³ Samurai drew energy from

59. FRED NEFF, *LESSONS FROM THE SAMURAI: ANCIENT SELF-DEFENSE STRATEGIES AND TECHNIQUES* 10 (1987); BARRY TILL, *SAMURAI: THE CULTURED WARRIOR* (1984); STEPHEN TURNBULL, *SAMURAI WARRIORS* (1987).

60. In Hawaii, to say that a person is a real samurai is a compliment suggesting that the person can withstand difficult times without complaint. The phrase implies a toughness in withstanding attacks and other adversities.

61. Thompson is a former college English literature professor and black belt in both judo and tae kwon do karate who teaches what he calls "verbal judo" to police officers. GEORGE J. THOMPSON & JERRY B. JENKINS, *VERBAL JUDO: THE GENTLE ART OF PERSUASION* (1993). The first chapter in the book is titled "Birth of a Communication Samurai."

62. *Id.* at 15.

63. Although as a facilitative mediator, I can understand not being concerned for whether settlement occurs, I do find it more difficult from a Western perspective to say that I do not care who wins and who loses to the extent that I am willing to die for the conflict. However, the code of the samurai, bushido, means to be ready to die. See HARRY COOK, *SAMURAI: THE STORY OF A WARRIOR TRADITION* 6, 26 (1993). See also YAMAMOTO TSUNEMATO, *THE HAGAKURE: A CODE TO THE WAY OF THE SAMURAI* 36 (Takao Mukoh trans. 1980) ("Bushido, I have found out, lies in dying."); INAZO NITOE, *BUSHIDO: THE SOUL OF JAPAN* (1969).

In August 1967, the Japanese author Yukio Mishima wrote his interpretation of the classic writing on samurai ethics and behavior called the *Hagakure*. The

attacks.⁶⁴ It is claimed that the samurai were able to stay calm, even when facing verbal abuse, and to offer empathy when faced with antagonism.⁶⁵ This description sounds like the consummate third-party neutral who is about to enter a conflict.

When developing the Asian conflict resolution theme in class, I show segments of the Akira Kurosawa⁶⁶ classic film, *The Seven Samurai*.⁶⁷ In this movie, Japanese farmers are trying to hire *ronin*⁶⁸ (masterless samurai) to protect their rice crop, their village, and themselves from a roving group of bandits who will attack the village after the rice harvest. The villagers are seeking samurai who will risk their lives, not for monetary pay, but for food, shelter, and the fun of fighting.⁶⁹

The villagers first meet the character called Kambei, who agrees to try to save the village. Kambei then seeks other samurai to join him.

best-known line from that book reads, "I have discovered that the Way of the Samurai is death. . . . In order to be a perfect samurai, it is necessary to prepare oneself for death morning and evening, day in and day out." YUKIO MISHIMA, *THE WAY OF THE SAMURAI* VII (Kathryn Sparling trans. 1977).

64. THOMPSON & JENKINS, *supra* note 61, at 36.

65. *Id.* at 67.

66. Kurosawa apparently understood negotiations very well. In the introduction to a book about Kurosawa's films, Minoru Chiaki, who frequently appeared in Kurosawa's films, offered a negotiation story as what is described in a "word-portrait" of Kurosawa.

"Kurosawa and Chiaki are fishing. It is during the shooting of *Seven Samurai*: only half the film is finished, the budget is all used up, shooting is interrupted.

Chiaki: So what's going to happen?

Kurosawa: Well, the company isn't going to throw away all the money it's already put into the film. So long as my pictures are hits I can afford to be unreasonable. Of course, if they start losing money then I've made some enemies.

Money is found, shooting is begun again; money is used up, shooting is interrupted. Kurosawa and Chiaki go fishing again.

Kurosawa: (Dangling his line with some satisfaction) Now that they've gotten in this deep, they have no choice but to finish it!"

DONALD RICHIE, *THE FILMS OF AKIRA KUROSAWA* 5 (1984).

67. *SHICHININ NO SAMURAI, THE SEVEN SAMURAI* (A Toho Production 1957). At its time, *THE SEVEN SAMURAI* was the most expensive film ever produced in Japan. RICHIE, *supra* note 66, at 107. The film was set in the sixteenth century at a time of civil wars in Japan. STEPHEN PRINCE, *THE WARRIOR'S CAMERA: THE CINEMA OF AKIRA KUROSAWA* 204 (1991). *THE SEVEN SAMURAI* theme was later incorporated into American film with *THE MAGNIFICENT SEVEN* that was filmed in 1960. *A FISTFUL OF DOLLARS*, a Sergio Leone Italian western starring Clint Eastwood that was filmed in 1965, was adapted from another Kurosawa film called *YOJIMBO*.
68. These masterless samurai were called *ronin*, which means "man of the wave." The reference is to a person who is tossed about on the waves of the sea. CAROL GASKIN, *SECRETS OF THE SAMURAI* 52 (1990); see also, ALAIN SILVER, *THE SAMURAI FILM* 18 (1977).
69. If the samurai are akin to lawyers, protecting the village for no pay seems akin to pro bono samurai work.

The villagers bring men to Kambei to see if he is willing to accept them as samurai in the fight to save the village.

In the first excerpt I use from *The Seven Samurai*, a wild man challenges a samurai. They fight with wooden sticks. The samurai and the wild man exchange only one blow. The wild man says their contest was a tie; the samurai says that he (the samurai) won. The wild man does not believe this. He makes another challenge to the samurai—this time to use real swords. As Kambei watches, the two men take fighting poses. Kambei looks carefully at both men and says, "What a pity. It is so obvious." Apparently Kambei can tell from a glance which man is the superior fighter. The wild man jumps about and uses many wasted movements. The samurai is calm and relaxed even though he is about to enter a potentially fatal conflict. When the second fight begins, the samurai easily kills the other man with one blow from his sword.⁷⁰

I use this first film segment to suggest that people in conflict give off signals about their preparation and ability to handle conflict. Good conflict resolvers can be recognized by their preparation. The way the wild man approached the conflict detracted from his ability to resolve the conflict. My students expect to learn a new way of preparing for and approaching conflicts that will improve their chances of reaching a satisfactory outcome.

I also use a set of excerpts from *The Seven Samurai* to show Kambei's test for choosing the samurai who will be asked to fight with him to save the village. Kambei asks Kimura, a young follower, to hide behind the door and then try to hit samurai applicants over the head when they enter the door to meet Kambei. True samurai are always on guard against attack from all angles. In one segment, a man who seems to be a poor samurai gets hit on the head as he enters. Later, a savvy samurai deflects the blow of the stick from Kimura without harm to himself or Kimura. In yet a third segment, a good samurai simply laughs as he approaches the door and does not even enter the doorway (either sensing the trick or seeing the shadow of the young man at the door).

Those film segments suggest to students that during a conflict they must always be vigilant and ready to defend against attack from any angle. They may hope to enter into a cooperative negotiation, but sometimes the situation changes rapidly and they will need to defend themselves. The samurai, like negotiation and ADR students, are not born with these instincts of self-protection. Both samurai and negotiators need to train to develop their defenses. *Sensei* is the Japanese word for teacher. Japanese law professors are called "*sensei*" by their

70. The body of the wild man falls in slow motion. This is a classic scene in samurai films. SILVER, *supra* note 68, at 37.

students just like American law professors are called "professor" by their students. In class, I am about to become the *sensei* teaching my students the savvy samurai's approach to communication for conflict resolution.

My last comments before the actual communication training begins are about how Japanese samurai dress for battle. Negotiation and conflict resolution often have elements of battle.⁷¹ The negotiator or mediator, just like the savvy samurai, needs to dress appropriately for the conflict. They need to protect against weapons of war or simply the abuse of stinging words.⁷² The samurai had specific battle uniforms built of many scales of lacquered iron, laced together with silk or leather.⁷³ Today, some people might say that a person entering a conflict needs to have thick skin. Negotiators and mediators must come prepared for an attack. When people are in conflict they are not themselves, and they often attack and lash out at anyone and everyone.

In addition to their protective armor, samurai were well known for their swords.⁷⁴ Samurai carried two swords called a *dayio* set. The longer sword, called a *tachi* or *katana*, was the traditional battle weapon. Only samurai were allowed to carry this type of sword.⁷⁵ The shorter sword, the *wakizashi*, was both used for fighting and ritual suicide, if necessary.⁷⁶

The two swords were key to the samurai's survival. Using an analogy to negotiations and ADR, the two swords that are key to the samurai's survival are like the two concepts of underlying interest and effective communication for conflict resolution. Like the samurai, negotiators and mediators need to be able to employ all their weapons. The great sixteenth-century samurai, Miyamoto Musashi, suggested that an effective samurai should use both swords when fighting.⁷⁷ That advice is as important for today's conflict resolver as it was for the sixteenth-century Japanese samurai.

71. LAURENCE J. BRAHM, *NEGOTIATION IN CHINA: 36 STRATEGIES* (1995); THOMAS CLEARY, *THE JAPANESE ART OF WAR* (1991); Bruce Kahn, *Applying the Principles and Strategies of Asian Martial Arts to the Art of Negotiation*, 58 ALB. L. REV. 223 (1994).

72. Another Gary Larson cartoon shows two people and a dog in a park. All three have bull's-eyes on their heads. The cartoon is entitled "How birds see the world." Negotiators, mediators, and samurai are often seen as targets by their opponents.

73. GASKIN, *supra* note 68, at 85.

74. See generally VICTOR HARRIS & NOBUO OGASAWARA, *SWORDS OF THE SAMURAI* (1990).

75. SILVER, *supra* note 68, at 186.

76. Ritual suicide is called "seppuku," which is the formal name for hara-kiri. GASKIN, *supra* note 68, at 59.

77. "When your life is on the line, you want to make use of all your tools." MIYAMOTO MUSASHI, *THE BOOK OF FIVE RINGS* 21 (Thomas Cleary trans. 1994).

VII. COMMUNICATION TRAINING WITH A FOREIGN INFLUENCE

After the importance of communication has been stressed and the students have been entertained and hopefully motivated by the duck and the samurai, the next task is to actually improve their conflict resolution communication skills. I engage the students in the simple, yet effective, communication exercises described below.

I have had a long-standing interest in the communication aspects of lawyering skills.⁷⁸ Over the course of my teaching career, my communication focus has shifted from interviewing and counseling towards ADR communication. Having conducted mediation trainings since 1980, I often see mediation trainees who have a difficult time with some of the basic communication skills used in mediation. Learning the theories and concepts behind the various communication skills helps some people learn to use the skills effectively. However, many people just never seem to "get it." They cannot ask questions without dominating the entire exchange. They miss clues suggested in vague responses.⁷⁹ And despite assigned readings for class and some examples, communication techniques like probing questions, active listening, and reframing still seem like a foreign language to them. They communicate like first-time tourists without a phrase book.

Teaching and training in Hawaii and the Asia-Pacific region has provided me with opportunities to teach negotiation and mediation to many non-native speakers of English. Some of these groups have

78. John Barkai, *Nonverbal Communication from the Other Side: Speaking Body Language*, 27 SAN DIEGO L. REV. 101 (1990); John Barkai, *The Lecture-In-Disguise*, 18 N. M. L. REV. 117 (1987-88); John Barkai, *How to Develop the Skill of Active Listening*, 30 PRAC. LAW. JUNE, 1984; John Barkai, *Active Listening*, 20 TRIAL 66 AUGUST, 1984; John Barkai & Virginia Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505 (1983); John Barkai, *Sensory Based Language in Legal Communication*, 27 PRAC. LAW. NO. 1, 41 (1981); John Barkai, *A New Model for Legal Communication: Sensory Experience and Representational Systems*, 29 CLEV. ST. L. REV. 575 (1980).

79. Two good examples of vague communication that results in ambiguous answers are found in two DILBERT cartoons by Scott Adams. In one, Dilbert is talking with a friend and their conversation goes like this:

Friend: That's our new "strategic diversification fund."

Friend: Our lawyers put your money in little bags, then we have trained dogs bury them around town.

Dilbert: Do they bury the bags or the lawyers?

Friend: We've tried it both ways.

In another cartoon, Dogbert is talking with Ratbert

Ratbert: Dogbert, sometimes I think you're the only one who respects me.

Dogbert: Wrong.

Ratbert: (talking to himself) Maybe I should drop it while there's still some ambiguity.

strong enough English skills to allow me to speak directly with them in English; other groups require translators. Naturally, these non-native speakers have an even greater difficulty learning to use the various communication skills associated with negotiation and mediation than do the native speakers of English.

I began using what I now call "The Barkai Chorus" for teaching communication for conflict resolution several years ago when I taught non-native speakers of English in Hong Kong.⁸⁰ Rather than teaching them about the concepts of effective communication, I simply gave them the exact words, phrases, and sentences to say in certain situations and had them practice by reading these lines out loud in class. In other words, I gave them the practice before the theory, and I made sure that they did the practice in class. This rote learning method seems to work quite effectively. After the students read out loud phrases and sentences like, "Tell me more about that," "How do you feel about that?" and "Can you put that in other words?", I will later hear the students using these same words and phrases during their negotiation and mediation simulations. If the students practice by doing oral drills, they are able to perform these skills without thinking about them during the simulation.

After using this read-a-long method of teaching communication skills to non-native speakers of English, I realized that most native-English speaking Americans were actually non-native speakers of effective communication for conflict resolution. Even Americans born and raised in this country do not know what to say or how to say it in conflict situations.⁸¹ Therefore, I began to use the Barkai Chorus with native speakers of English, and the results were the same—it was effective. I now treat students in my negotiation and ADR classes as non-native speakers of an effective conflict resolution language. This method is effective in getting students to develop new communication skills for negotiation and conflict situations and has become the foundation for my communication skills training. Students later can develop their own phrases to accomplish the same ends, but initially most students find it much easier to simply read words out loud than to create their own phrases. In time, they can develop their own repertoire of phrases to use in conflicts.⁸²

80. I was a Senior Visiting Scholar at City Polytechnic of Hong Kong (now City University of Hong Kong) in 1992-93.

81. Some books offer guidance similar to the Barkai Chorus and provide trainees with phrases and sentences they can use in conflict and other situations. See SAM DEEP & LYLE SUSSMAN, *WHAT TO ASK WHEN YOU DON'T KNOW WHAT TO SAY* (1993).

82. I now sometimes use a similar method for teaching witness examination in other courses. Most students have difficulty learning to conduct both direct and cross examinations. So I tell them that they must learn the language of "court talk," which is a language different from the one they naturally speak. I also tell stu-

VIII. COMMUNICATION SKILLS FOR CONFLICT RESOLUTION

The two basic communication skills for conflict resolution that I teach are questioning and active listening, and I use the read-a-long Barkai Chorus method as a fundamental part of teaching these skills. Sometimes the readings are done with just two students reading to each other; sometimes the whole class reads the words out loud in unison. The students usually laugh when we use the Barkai Chorus, but it is helpful in getting students to use communication skills effectively in conflict situations. To return to the communication samurai metaphor, for best results the Barkai Chorus needs to be practiced several times, just like a kata for a martial arts practitioner.⁸³

A. The Questioning Exercise

The first communication skill that I focus on is asking questions. A major point from the debriefing of the Ugli Orange simulation is that most people spend too much time trying to persuade the other side in a negotiation and not enough time asking questions. Most negotiators could improve their negotiation outcomes if they would simply ask more questions.

After a short explanation of the differences between open-ended, follow-up, and leading questions,⁸⁴ I have the students work in pairs to do my Questioning Exercise shown in Appendix C. Each student has a copy of the one-page handout titled "Questioning." The initial, open-ended question, "What do you think is one of the most important issues facing Hawaii in the next five years?"⁸⁵ is followed by a variety of general clarifying and probing questions as well as a facilitating phrase and an example of passive listening. I explain that open-ended questions are designed to allow the party being questioned to choose the topic to be discussed⁸⁶ and that follow-up questions are designed

dents that experienced trial lawyers can easily switch between regular talk and "court talk," but that initially it is difficult to learn. I teach students by example, having them read out loud from trial transcripts and trial advocacy textbooks. See e.g., THOMAS MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* (4th ed. 1996).

83. The "kata" is a series of martial arts movements performed by students to improve their performance. NORMAN BARRETT, *MARTIAL ARTS* 11 (1988); STEPHEN TURNBULL, *THE LONE SAMURAI AND THE MARTIAL ARTS* 42 (1990). Kata are both meditative exercises and lessons in techniques. Today all the martial arts use kata or similar sets of movement patterns to help train their students. GASKIN, *supra* note 68, at 91-92.

84. DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING* 38-52 (1977).

85. For international groups, I usually change the focus of the question to issues facing "your country," and for business groups I ask about issues facing "your organization."

86. BINDER & PRICE, *supra* note 84, at 38.

to get more information from the party. Follow-up questions stay with the topic raised by the speaker and do not require the speaker to switch topics to answer a question that may take the speaker off his current train of thought. The first three questions (Tell me more about that. What do you mean by that? Can you put that in other words?) usually elicit more factual information. The fourth question (How do you feel about that?) elicits the feeling dimension of the conflict. Feelings are facts, but many lawyers neglect feelings. The list of questions also includes a facilitating probe (That's helpful, keep going). In our discussions, I contrast facilitators with inhibitors.⁸⁷ The final example is of passive listening (Uh-huh). Passive listening is often accompanied with the nodding of the head.

Students are asked to work on this Questioning Exercise in pairs. One student, the questioner, reads the initial open-ended question ("What do you think is one of the most important issues facing Hawaii in the next 5 years?"), and the second student, the responder, gives an answer.⁸⁸ The questioner then asks four or five of the questions from the list of probing questions in any order, asking one question after each answer by the responder. The next question should flow naturally and logically from the previous answer.

After a couple of minutes, we have a mini-debriefing before I ask the students to switch roles. I ask the students what this questioning felt like and who seemed to be doing the harder work. The questioners are often struck by how simple the questions seem. They sometimes feel awkward using these questions because they are so simple. However, even though the questions are quite simple ("Tell me more about that."), the responder often gives very serious consideration to his or her answers. Though simple, these questions are thought-provoking. The responder works hard to formulate answers. He or she will often look upward, pause, and respond slowly and tentatively, as if searching for the right words before speaking. During the debriefing, I say that you can almost see the smoke rising from the responder's head as they are thinking how to answer the seemingly simple probing question. And because the responder is working so hard, the responder

87. I explain that facilitating responses may contain a lie. For example, most trained listeners are willing to say "that's helpful," even if the response was not helpful. But saying "that's helpful," encourages the responder to keep talking and perhaps to provide more useful information.

I contrast the facilitating question with the inhibitor which blocks full communication. See BINDER & PRICE, *supra* note 84, at 10. In my favorite example, I turn to the class and say, "Now imagine that a student had asked me a question and instead of saying, 'that's helpful' I had said, 'That's absolutely the dumbest question I have ever heard in all my 23 years of teaching.' That would be an inhibitor! The student is not likely to ever ask a question in class again.

88. I tell the responders not to look at the handout when they do this exercise. Otherwise, they tend to focus on the paper in front of them rather than on their answers to the questions.

does not even notice much about the questioner, including the fact that the questioner might be feeling awkward about asking such simple questions. If this exercise were a real negotiation, the questioner would be getting valuable information.

My debriefing of this exercise is short. The entire exercise takes no more than 15-20 minutes. I sometimes demonstrate the questioning technique in the debriefing by asking questions such as "How did you feel about this exercise?" I point out that even if the questioner did not learn any new factual information about the subject, at least the questioner learned about the responder's unique perspective on the topic. If this were a negotiation, the questioner might have learned the responder's interests underlying the stated negotiation position.

To give the students practice asking questions in the context of a negotiation, I have the class ask some questions out loud to others in the class while I provide feedback and critique. This practice seems especially valuable when teaching non-native speakers of English, but it also works well with law students and lawyers. I usually ask students to think back to the Ugli Orange simulation and ask questions of their opponent. I sometimes put all the Doctor Joneses on one side of the room and the Doctor Rolands on the other. Each Doctor Jones asks one question of a Doctor Roland and then we switch to have the Doctor Rolands do the questioning.

B. Active Listening

The second communication skill that I teach for conflict resolution is active listening. Active listening is a verbal response in which the listener reflects back to the speaker the speaker's main ideas or feelings.⁸⁹ Active listening is one of the most important listening skills for conflict resolution,⁹⁰ and is not a style of listening that people generally use unless they have had some training. This skill sounds very simple, however, it is difficult and challenging.

I have used a number of different methods to teach active listening. When I co-taught a class called *Lawyering Skills* that covered active listening, the other professor and I would do a lecture-in-disguise to

89. Active listening is sometimes referred to as empathy statements because of its focus on the feelings of the speaker. Barkai & Fine, *supra* note 78. In teaching active listening, I initially focus on content and facts because many students are more concerned and comfortable with facts than feelings. However, once the ADR skill focus turns from negotiation to mediation, the importance of disputants feelings becomes more obvious to the students and more acceptable to practice in class.

90. For a list of 14 reasons to use active listening, see THOMPSON & JENKINS, *supra* note 61, at 79-85. For reasons to use active listening in interviewing and counseling see Barkai & Fine, *supra* note 78, at 510-17.

demonstrate active listening.⁹¹ Another method I used was to call on students one at a time to active listen to a statement I said to them. This method created tension for some students. It had the regular psychological pressures for a student similar to being called on in class to discuss a case. When demonstrating this method as part of a teaching demonstration at a clinical legal education conference, another clinical faculty member who was playing the role of a student commented on how difficult it was for her to active listen even though she taught active listening herself. She explained that the pressure of being listened to and evaluated by her peers made it very difficult to concentrate on the active listening process. I realized that if it was difficult for a teacher playing the role of a student, it must be even more difficult for a real student.

For several years, my primary method of teaching active listening was to have students practice active listening in small groups in class after they did some readings on the subject and we had discussed some examples in class. I gave the students handouts with statements to active listen. Students worked in groups of three—one speaker, one active listener, and one coach/critiquer. I circulated around the class to listen, offer individual critique and feedback, and gather information to use in the class debriefing. This teaching method was generally effective, but many students still did not seem to understand how to active listen.

After working with non-native speakers of English, I began using the "Barkai Chorus" read-a-long in my teaching of active listening. The students are given a one-page handout entitled "Active Listening," (Figure 2) which lists several active listening examples as well as an analysis of what is happening in each example. The examples are read out loud in class. Each example has three speaking parts—two for the person being active listened and one for the active listener. I read the role of the person being active listened out loud. The class as a whole then reads the role of the active listener. And I, as the person being active listened, read the response to the active listening statement.⁹²

91. Barkai, *The Lecture-In-Disguise*, *supra* note 78. The Lecture-In-Disguise is a teaching technique whereby the professor uses a simulation to present class materials to students.

92. Initially, I wrote only two statements in each example, one for the instructor and one for the student who is active listening. Later, I added a third statement for the instructor (a response to the active listening) because a speaker will typically give such a responsive statement in a real-life instance of active listening. Active listening both clarifies the speaker's original statement and encourages the speaker to offer additional information. Even when an active listening statement is inaccurate, a speaker will usually offer additional information in order to correct the active listener's mistakes.

FIGURE 2
ACTIVE LISTENING

	Speaker (Instructor)	Active Listener (Student)	Speaker Continues	Comments
1	I just had this great class about communication.	<i>What I hear you saying is you had a great class about communication.</i>	Yeah, that's what I said. Are you feeling OK today?	Classic active listening. Uses introductory phrase. Repeats exact words.
2	The instructor was terrific. It was really good. The time went very fast.	<i>It sounds to me like you learned a lot and had fun too.</i>	That's really true. I was surprised by how much I learned.	Another classic active listening form -- introductory phrase and paraphrasing.
3	It all sounds so simple, but there are some complicated parts.	. . . simple but complicated?	Yeah, the ideas are easy, but there is really a lot to it.	Drops introductory phrase. Repeats a few of the exact words.
4	You know I never thought about the fact that in a conflict situation, what the other guy is saying, is often not what he meant to say.	. . . the words people use is not what they are thinking . . . ?	Right, and it seems so obvious after that class. In some ways that explains what happened between Peter and me.	Paraphrased, but still not a complete sentence.
5	Things were really heating up between us. It was getting weird, but neither of us recognized that.	. . . the conflict was building but you didn't notice it happening?	Oh, we noticed it all right. But it just shouldn't have happened between good friends like us.	Speaker corrects inaccurate active listener.
6	What do you think you would have done in a situation like that?	. . . you are concerned about what to do in spots like that?	I really am. It shouldn't have happened, and I don't want it to happen again. He and I need to sit down and talk about it when we are both feeling calmer.	Active listening used instead of answering the question.
7	[if they go on and on and on and on and on]	Wait a minute! Let me see if I understand you correctly . . .		Active listening is used to interrupt without offending.

The key points that I teach using the Barkai chorus for active listening are:

- 1) do not use the classic active listening introductory phrases when active listening,
- 2) use short phrases and not complete sentences in the active listening response,
- 3) active listen the central ideas and feelings,
- 4) paraphrase the speaker if possible,
- 5) you will make mistakes, but active listening self-corrects,
- 6) active listening can be used to avoid prematurely answering questions, and
- 7) active listening is an inoffensive method to interrupt a speaker.

I use the Active Listening handout in a Barkai Chorus with the whole class reading in unison one line at a time to demonstrate the key points of active listening. Line 1 of the handout is an example of classic active listening because the active listening response uses one of the basic introductory phrases—"What I hear you saying is . . ." Most people who teach active listening suggest using some form of introductory phrase such as "What I hear you saying is . . ." or "It sounds to me like . . ." I used to think that was a good way of active listening and I taught students to active listening that way myself.⁹³ Lately, however, I have come to realize that using introductory phrases is an obvious signal that you are using some communication technique on the speaker. Now I tell the students that if they have been taught active listening, they have been probably taught how to fail. That usually catches their attention! When taught to use those introductory phrases, students are being programmed to fail at their first attempt at active listening. After a failure, they are not usually willing to try to use active listening again. When you are detected using a "technique" on someone, you tend not to try that behavior again because you do not want to be caught again.

First-time active listeners fail because when they try active listening outside the classroom, they typically try it on the first person they see socially—usually a friend or family member. This friend or family member is accustomed to the student's usual pattern of speech, so when the student tries to active listen with a phrase like "It sounds to me like what you are saying is . . .", the friend or family member quickly becomes aware that something odd is happening. Line 2 is another example of classic active listening by using the introductory phrase—"It sounds to me like . . ." The active listening statements in Line 1 and 2 are adequate statements, but they will likely be detected as "techniques" by people who know you. However, if you use these

93. Barkai, *Active Listening*, *supra* note 78.

responses on friends or family members who are emotional at the time, they probably will be too distracted to notice your "technique."

To me, the secret of successful active listening is to not use the introductory phrases and not use complete sentences. Line 3 is an example of an effective active listening response ("... simple but complicated?"). The active listener simply repeats back a few of the key words spoken by the speaker but does not use all of the words and does not use a complete sentence. This might be called the "parrot" form of active listening in which the listener is similar to a parrot that repeats back part of what it hears. My primary goal at this point is to teach students to repeat back key thoughts, ideas, or feelings, but without using complete sentences. Line 3 active listen generally accomplishes those goals.

Line 4 represents what is probably the most elegant and least detectable form of active listening—rephrasing the essence of what the speaker has said and saying it back to the speaker in less than a complete sentence. ("You know I never thought about the fact that in a conflict situation, what the other guy is saying, is often not what he meant to say." is rephrased as "... the words people use do not reveal what they are thinking?") Although it is difficult to hear accurately what was said and to immediately rephrase it, it is also very effective.

Lines 5 and 6 demonstrate two other important aspects of active listening; the process self-corrects if you make a mistake, and active listening can be used to avoid answering questions. Students are often nervous about using such a listening technique, so I teach them that mistakes are a natural part of the listening process and that active listening is the best method for correcting those naturally occurring mistakes. I emphasize that active listening self-corrects, meaning that if the active listener has misunderstood or incorrectly reflected the speaker's ideas or emotions, the speaker immediately will correct the active listener and the conversation will continue.

Most listeners use passive listening even when they are listening attentively. In other words, they make eye contact and nod their heads approvingly, implying that they understand. Unfortunately, neither the speaker nor the listener knows whether the speaker said what he meant to say or whether the listener heard the message that speaker sent. With active listening, the listener actively repeats back what he heard from the speaker. Line 5 demonstrates what happens when the active listener verbalizes what he thought was meant by the speaker, and the speaker realizes that this is not what he meant. The speaker immediately corrects the listener and the conversation continues.

Line 6 shows how active listening can be used to avoid answering a question, or to simply delay the answer until a more appropriate time. This use of active listening is based upon the communication principle

that when a person poses a question, they often have a tentative answer already in mind. Active listening a question usually encourages the speaker to verbalize the tentative answer and to direct the conversation. A typical active listening response that sets this process in motion is to say, "You are concerned about. . . ." Active listening provides a socially acceptable way of not answering a question. Not answering is often a useful negotiation tactic. This use of active listening can be effective when you are trying to protect information in a negotiation or when you do not want to offer advice as a mediator.

Line 7 demonstrates a way to use active listening to interrupt a long-winded, rambling speaker, in a way that is effective and not offensive. The speaker will actually enjoy the interruption. The reason why these people do not mind this type of interruption is that you are telling them what they have just said.⁹⁴ Simply say, "Wait a minute. Let me see if I understand you." Usually, the speaker is willing to listen to this active listening response and is almost obliged to listen. How can the speaker say, "No, I don't want to hear what I have been saying. I don't want to learn whether you have understood what I said." Essentially the person is being asked to listen to themselves. Usually this process focuses and cuts short a rambling speaker.

Finally, I return to cartoons. For many years I have used a cartoon for the last question in my final examinations. I reproduce a single-frame cartoon with the caption removed and ask students to write a caption based upon some aspect of the course. All captions written in English receive full credit (usually 10 percent). I think this is an interesting way to allow students to be creative, release some tension, and to provide some entertainment to me and the law school community.⁹⁵

One student wrote an active listening caption for a cartoon question on my criminal litigation clinic final examination. The cartoon was a courtroom scene with a man and his lawyer appearing in front of a judge. The student caption went like this:

Defendant: Judge, I want a new lawyer. Every time I talk to my lawyer, all he does is repeat back to me what I just said.

Judge: What I hear you saying is that you feel frustrated because your lawyer

94. See THOMPSON & JENKINS, *supra* note 61, at 79.

95. I never read the cartoon captions when I am grading the exams. After the exam I post on the bulletin board the cartoon and the captions for the whole law school community to read. At non-law school trainings, I also use the write-a-caption for a cartoon idea. In that setting I show a cartoon early in the presentation and allow participants to submit captions during the day. I give a prize at the end of the day for the best caption. For a time, I gave a candy bar for the prize, but lately I have been giving away a plastic, ornamental orange that I refer to as the Ugli Orange. Such plastic oranges can be purchased for about \$1. Hopefully, this will be a good reminder of the key concepts of the simulation and of the course.

C. Putting it All Together

Up to this point, the communication class has focused on what has been called micro-skills, taking just one technique and working on that technique alone.⁹⁶ However, effective listeners do not use just one communication technique nor do they use the very same technique repeatedly during the course of a communication. Effective listeners mix and match all the tools in their listening skills toolbox.⁹⁷

A variation of the Barkai Chorus⁹⁸ called "Communication Techniques" (Figure 3) gives students the experience of using several of the communication techniques in one conversation. This chorus was the first one that I created when working with international students. In class, I now use this three-column chorus after we have covered the skills of questioning and active listening. I briefly discuss the communication techniques as a review and then tell the students that they as a group will read aloud the Listener role (1,3,5,etc), and I will read the Speaker role (2,4,6, etc). The third column lists the various techniques that the students are doing in this exercise. The chorus also performs the function of a lecture-in-disguise by stressing the importance of communication skills in negotiation.

The first three questions by the students demonstrate an open-ended, a follow-up, and a clarifying question.⁹⁹

1. What do you think is one of the most important skills for negotiators? (open-ended)
3. Tell me more about that. (follow-up)
5. What do you mean by "collect information?" (clarifying)

The exercise continues with examples of passive listening ("Uh, huh."), a narrowing question ("Can you be more specific?"), a facilitator ("That's helpful, keep going."), and active listening ("They collect the information by using these techniques?").

IX. CONCLUSION

This article has presented a variety of the more unique and unusual methods that I use when teaching negotiation and ADR. Optical

96. ALLEN IVEY & JERRY AUTHIER, *MICROCOUNSELING* (1978).

97. Remember, "When your life is on the line, you want to make use of all your tools." MUSASHI, *supra* note 77.

98. I also use this "Barkai chorus" method when we work with mediation and meeting facilitation. Appendix A contains Practice Mediator Lines that I have students read out loud one-on-one to a partner before they do their first in-class mediation. When the students do their first simulated mediations and facilitation, I hear them use those very same phrases during the mediation and the facilitation.

99. I personally do not make a distinction between follow-up and clarifying questions. Both are probes to me. Some instructors may distinguish between these types of questions.

FIGURE 3
COMMUNICATION TECHNIQUES
OPEN-ENDED QUESTIONS, FOLLOW-UP QUESTIONS, AND
ACTIVE LISTENING

Instructor	Student — Listener	Technique
	1. What do you think is one of the most important skills for negotiators?	Open-ended Question
2. Ah, I'd say communication skills.	3. Tell me more about that.	Open-ended, Follow-up Question
4. Sure. Negotiators need to be able to collect information and to persuade people. Of course they need to communicate to do that.	5. What do you mean by "collect information?"	Clarifying
6. Negotiators need to learn information from other people. So negotiators "collect" this information by asking appropriate questions and using other communication techniques.	7. Humm, hum.	Passive Listening
8. After they have collected the information they then use it in some way.	9. Can you be more specific?	Narrowing
10. Sure. When negotiators learn about the other side's interest, they can use that information during the negotiation.	11. That's helpful, keep going.	Facilitator
12. They use techniques like open-ended questions, follow-up questions, clarifying questions, and active listening.	13. How so?	Open-ended
14. They use these techniques to gather information from their opponent.	15. They collect the information by using these techniques?	Summarization Active Listening
16. Yes, the good communicators collect the information which is an important foundation for the negotiation.	17. How do you feel about that?	Open-ended question Probe for Feelings
18. I think it is one of the most important things that negotiators do, and unfortunately, many negotiators neglect these skills.	19. So you think communication is important, but many negotiators neglect it?	Summarization Active listening
20. Right. Negotiators should realize that good communication techniques can help them to be successful, and they should pay attention to, and practice good communication techniques.	21. Thanks. You have helped me to better understand your views about communication. And, I hope I have helped you demonstrate some of the techniques that you have talked about.	

illusions, cartoons, samurai, and read-a-long communication exercises are some of the teaching techniques and methods that I use both to entertain the students and make the important ideas about negotiation and conflict resolution more memorable. Like most negotiation and ADR teachers, I cover the topics of underlying interests and effective communication in class, but I probably offer a different perspec-

tive on these topics by using Ugli Oranges, negotiating with a duck, and a savvy samurai.

The samurai warrior of olden Japan was a skilled and professional conflict resolver. The samurai carried two swords into battle as his major weapons. Similarly, today's negotiator and ADR practitioner uses the two concepts of underlying interests and effective communication skills when engaged in a battle against conflict. Whether you are a savvy samurai or a savvy negotiator, you must realize that although your opponent might appear to you to be a devil, he is probably just another person in legitimate pursuit of interests which simply differ from yours. In negotiation and ADR, you need to better understand why your opponent appears to be a devil and change that image to one more productive for resolving the conflict.

Let me close by asking you one more time to return to the cartoon of the negotiation in the clouds between the angels and the devils. I used that cartoon in a cartoon-captioning contest at the Association of American Law Schools (AALS) 1996 Mini-Workshop on Alternative Dispute Resolution in Orlando, Florida. The grand prize winner in that contest and one of my favorite captions is very appropriate for the end of this article.

The Angel says to the Devil:

"This guy's a lawyer. Normally, we let you have the lawyers, but I think we will take him. He taught ADR!"¹⁰⁰

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100. This caption was created by Professor Ann Woodley of the University of Akron Law School. I awarded it the grand prize and gave it the Golden Pineapple Academic Category Award. Other winning captions, their authors, and the award categories I created were:

Political Negotiation Category Award

"Tell Newt, we will cut collection plate requests and wasting time on lost souls, but we will not agree to delegate salvation decisions to the states." Fred Galves, McGeorge School of Law

Reframed Communications Category Award

Devil: "I feel that not only don't you acknowledge anything positive about my position, but you can't even say anything good about me."

Angel: "Well, I'll give you this: you're persistent." Leary Davis, Campbell University School of Law

Best Negotiation Offer Category Award

"That's my final offer - ten angels and Gideon's Trumpet, in exchange for a life time supply of those outstanding barbecued ribs you make down there." Sarah Rudolph, Creighton University School of Law

Neutrality Category Award

"And who do you suggest would ever in their right mind mediate between us?" Scott Hughes, Thomas M. Cooley Law School

Mediation Category Award

"I think it's important to recognize that we both share a concern about the afterlife". Marc Fleisher, Brooklyn Law School

Eternal Bravado Category Award

Appendix A
PRACTICE MEDIATOR LINES
FORUM PHASE – DEALING WITH THE
PAST AND THE PRESENT

Can we agree that as a ground rule, we will . . .
Remember, you both agreed not to interrupt. You will get your unin-
terrupted time too.
Tell me more about that.
When did this happen?
So what you are saying is . . .
Wait. Let me be sure I understand correctly. You're saying . . .
So, as far as you are concerned . . .
What else is important?
Could you say more about that?
How do you feel about what happened?
What do you mean by that?
Is there anything else you want to add?
Let's move to the issue of . . .
Can you tell me more about . . .?
What additional information do you have on that?
Of all that you have talked about, what is most important to you now?

NEGOTIATION PHASE – DEALING WITH THE FUTURE

What could X do to help you solve this problem?

"I want to make it clear up front, that we're ready to take this one to trial."
Dick Wirtz, University of Tennessee College of Law

Literary Category Award

"O.K. O.K. So we all agree. Milton will be the mediator." Bill Patton, Whittier

Negotiation Demands Category Award

"Final offer? What do you mean 'final offer?'" Lynn Hogue, Georgia State Uni-
versity College of Law

Joint Interests Category Award

"Surely we can find common ground!" Marjorie McDiarmid, West Virginia
University College of Law

Outrageous Demand Category Award

"OK, we will agree to turn down the heat to 900 degrees, and even to put in a
good word on Satan's latest appeal, but demanding that Genesis contain a 'But
see the Satanic Bible' explanatory footnote is completely out of the question."
Fred Galves, McGeorge School of Law

Ivory Tower As Prison Category Award

"Forget it! Satan blew his tenure chances a long time ago, so he must spend
eternity either grading exams or attending faculty meetings." Fred Galves, Mc-
George School of Law

Legal Profession Category Award

"No, we will not accept a lawyer as a mediator!" Scott Hughes, Thomas M.
Cooley School of Law

What can you do to help solve this problem?
Do you have any other ideas for solving this problem?
What do you think will happen if you can't negotiate a solution?
How do you want things to be between the two of you?
Is what you are talking about now helpful in reaching a solution?
Put yourself in Mr./Ms. X's shoes. How do you think they feel right now.
What do you have in mind on that topic?
If X were to do A, what would you be willing to do?
What I hear you saying is that you might be willing to . . .
You both seem to agree that . . .
Do you agree with the solution that we are talking about?
What you are talking about sounds like it might work. What will happen if . . .

MUCH LATER – MEDIATOR SUGGESTIONS:

How would you feel about . . .
What would happen if you tried . . .

Appendix B

Confidential Instructions

DR. JONES

UGLI ORANGE

You are Dr. Jones, a biological research scientist employed by a pharmaceutical company. You have recently developed a synthetic chemical useful for curing and preventing Rudosen, a disease contracted by pregnant women. If not caught in the first four weeks of pregnancy, the disease causes serious brain, eye, and ear damage to the unborn child. Recently, there has been an outbreak of Rudosen in your country and several thousand women have contracted the disease. You have found, with volunteer victims, that your recently developed synthetic serum cures Rudosen in its early stages. Unfortunately, the serum is made from the Ugli orange which is a very rare fruit. Only about 4,000 of these oranges were grown in the whole world this season. No additional Ugli oranges will be available until next season, which will be too late to cure the present Rudosen victims.

You have demonstrated that your synthetic serum does no harm to the pregnant women. There are no side effects. Unfortunately, the present outbreak of Rudosen was unexpected and your company had not planned on having the serum available for six months. Your company holds the patent on the synthetic serum and it is expected to be a highly profitable product when it is generally available to the public.

You have recently been told a Mr. Cardoza, a South American fruit exporter, has 3,000 Ugli oranges. If you could obtain all 3,000 of these Ugli oranges, you could make enough serum from the juice of these oranges to both cure all the present victims and provide sufficient inoculation for the remaining pregnant women in your country. No other country currently has a Rudosen threat.

You have been told that Dr. Roland is also urgently seeking Ugli oranges and is also aware that Cardoza has some of these special oranges. Dr. Roland is employed by a competitor pharmaceutical company. Roland has been working on biological warfare research for the past several years. There is a great deal of industrial espionage in the pharmaceutical industry. Over the past several years, Dr. Roland's company and your company have sued each other for infringement of patent rights and espionage law violations several times.

You've been authorized by your company to approach Cardoza to purchase the 3,000 Ugli oranges. You have been told Cardoza will sell them to the highest bidder. Your company has authorized you to bid as high as \$250,000 (US) to obtain the juice of the 3,000 available oranges.

Before approaching Cardoza, you have decided to talk with Dr. Roland. Think carefully about what information you are willing to tell the other side, and what information you will not disclose.

Confidential Instructions

DR. ROLAND

UGLI ORANGE

You are Dr. Roland, a research biologist for a pharmaceutical company. Your company has a government contract to do research on methods to combat enemy uses of biological warfare, but the government has asked your company for assistance with an immediate problem.

Recently, several old experimental nerve gas bombs were moved to a small Pacific island. While they were being moved, two of the bombs developed leaks. The leaks are presently controlled, but government scientists believe that within two weeks the gas will leak out of bomb chambers and escape. There is no known method of preventing the gas from getting into the atmosphere and spreading to the coast. If the leak occurs, several thousand people will die or incur serious brain damage.

You have developed a synthetic vapor that will neutralize the nerve gas if it is injected into the bomb chamber before the gas leaks out. The vapor is made with a chemical taken from the Ugli orange, a very rare fruit.

You've heard that a Mr. Cardoza, a fruit exporter in South America, has 3,000 Ugli oranges. If you get all 3,000 Ugli Oranges you could make enough of the chemical from the rind of these oranges to neutralize all of the gas if the serum is developed and injected efficiently. Your company has not been able to locate any more of these Ugli oranges. As far as you know, there are only 3,000 such oranges in the world crop this year.

You have learned that Dr. Jones is also urgently seeking to purchase Ugli oranges and that Jones is aware that Cardoza has oranges available. Dr. Jones' company and your company are highly competitive, and there is a great deal of industrial espionage in the pharmaceutical industry. Your company and Dr. Jones' company have sued each other twice for infringement of patent rights. One law suit is still going on.

You've been authorized by your company to approach Cardoza to purchase the 3,000 Ugli oranges. You have been told that Cardoza will sell them to the highest bidder. Your company has authorized you to bid as high as \$250,000 (US) to obtain the oranges.

Before approaching Cardoza, you have decided to talk to Dr. Jones. Think carefully about what information you are willing to tell the other side and what information you will not disclose.

Appendix C

QUESTIONING

*What do you think is one of
the most important issues facing
Hawaii in the next 5 years?*

Tell me more about that.

What do you mean by that?

Can you put that in other words?

How do you feel about that?

What do you mean by _____?

Can you be more specific?

How so?

In what way?

That's helpful, keep going.

Humm, hum.